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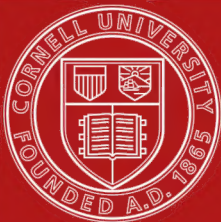
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COMMENTARIES
ON THE
LAW OF WILLS

EMBRACING
EXECUTION, INTERPRETATION AND ADMINISTRATION

INCLUDING THOSE RULES OF REAL PROPERTY AND PRINCIPLES
OF EQUITY WHICH AFFECT TESTAMENTARY DISPOSITIONS,
WITH FULL REFERENCES TO AMERICAN AND ENGLISH
STATUTES AND DECISIONS, AND ALSO AN AP-
PENDIX CONTAINING FORMS AND PRECE-
DENTS, AND THE LEADING WILLS ACTS.

BY
JOHN E. ALEXANDER,
OF THE SAN FRANCISCO BAR.

IN THREE VOLUMES.
VOLUME ONE.

SAN FRANCISCO, CALIFORNIA.
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PREFACE.

The object of this work is to give a statement of the underlying principles governing the law of wills, noting the various changes which have taken place, and bringing the subject down to date. Although in the past there have been great expositions of the law of wills, it is because the law has been and is ever changing that the author deems a further work, containing the latest developments, will be of value to the profession.

The power of testamentary disposition is not a fundamental right, but depends upon statute, the rules of intestate succession being the more natural. The development of the power of testamentary disposition was largely halted by feudalism, with its demand of military service and right of primogeniture. The doctrine of uses and the Statute of Uses left their impress. Then the Statute of Wills, and the statute which followed and explained it, enacted during the reign of Henry VIII; the Statute of Frauds, which dates from the time of Charles II, and the Statute of Wills passed in the first year of the reign of Queen Victoria, among other enactments stand out as landmarks. In the United States we follow the common law of England. Our statutes relative to wills may be traced back to the laws of England, with such modifications as have appealed to the minds of the various legislatures. The law of wills is a matter of development; the rules of today are the outgrowth of the rules of the past, modified by changed conditions. But in many instances we must hark back to the very early decisions, as for instance the Supreme Court of California very recently divided as to the meaning

of the statute of that state which was founded originally upon a section of the Statute of Frauds, and regarding which modern precedents were lacking.

The author has attempted to set forth the principles and rules under and by which wills were first governed, to trace their changes, to explain their development, and to state those today governing. And since the present rules have evolved from those of the past, it is hoped that the portions of this work dealing with very early matters may prove not only of interest, but of actual benefit; and since the statutory law in the United States is based largely upon that of England, the statutes and decisions of England have been given equal prominence with those of the United States.

It will be found that different rules prevail in different jurisdictions, for statutory or other reasons. The author has sought to note such differences and give the reasons therefor. The execution of a will and the disposition of property thereunder may depend, according to the nature of the property and the domicile of the testator, upon the laws of many jurisdictions. For this reason, and that the work may be useful to all, English decisions have been included with those of these United States.

The subject is divided into three natural divisions—execution, interpretation, and administration—each being treated in a separate volume. An appendix containing forms and precedents has been added for the convenience of those desiring ready reference, also the leading wills acts for the benefit of those who may not have ready access to the same, and for use in connection with the forms and adjudicated cases.

SAN FRANCISCO, CALIFORNIA,
October 1st, 1917.

JOHN E. ALEXANDER.

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COMMENTARIES ON THE LAW OF WILLS

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ORIGIN AND DEVELOPMENT OF THE LAW OF WILLS.

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- § 2. Ancient conception of testamentary power.
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§ 1. Nature of the Right to Make a Will.

The right of disposing of property after death according to directions given during life, although of great antiquity, is the result of the social life of man and is governed by laws which he has enacted.¹ The right of children and kindred to succeed to the property of the deceased is of much earlier origin, but even that right, seemingly allied to the law of nature, appears to be the result of long established custom.² Some claim that the principles of love and duty should compel man to cause his property, after his death, to be passed on to his blood descendants, yet the law of wills, within certain prescribed limits, allows him to disregard the claims of those who are naturally dependent upon him. This apparent conflict is simplified when we consider that the rights of intestate succession and of testamentary disposition have developed with the growth of society and have been regulated according to the wisdom of man, influenced by both love and charity.

§ 2. Ancient Conception of Testamentary Power.

At the commencement of man's social life, the Family was the unit, governed by the Patriarch who held his possessions as a trustee for his descendants and kindred. The Family has been described as a corporation with the right of succession. With the growth of cultivated society the rights of the Family gave way to the claims of the House, the Tribe, and the State; and as the ties which bound the few expanded until they encompassed the many, there arose new duties to others than kindred. The fulfillment of these new obligations could not be accomplished under the rules of succession, and thus was

1 2 Bl. Com. *12.

2 2 Bl. Com. *11.

opened the way for the conception of the idea of other means of disposing of property after death.³

The right of testamentary disposition, being allied to social development, was naturally unknown to barbaric races. The ancient Hindoo had no true conception of a will, but by means of adoption he provided for the succession to his property after his death.⁴ There is authority that the right of testamentary disposition existed among the ancient Hebrews,⁵ but the quotations generally relied upon,⁶ according to the author, hardly uphold the contention that property was disposed of by will, but refer more to transfers and rights of succession.

In Athens, before the time of Solon, property descended to the children or kindred of the deceased. The laws of Solon, 594-590 B. C., allowed testamentary disposition to a limited extent. The right was granted only to those who had no children of their own, who were of sound memory and whose minds had not failed because of sickness, drink, charms or other violent and extraordinary means, or because of the enticements or persuasions of women. Constraint or subornation was deemed to deprive man of his reason, whether accomplished by fraud or violence, pleasure or sorrow, passion or madness.⁷ In the event of children the right was qualified unless the sons had died before reaching the age of sixteen, and as to daughters, that the devise was conditional that the devisee marry them.⁸

Blackstone states that wills were unknown in Rome prior to the laws of the Twelve Tables,⁹ about 450 B. C.;

³ Maine, *Ancient Law*, ch. 6.

⁴ Maine, *Ancient Law*, ch. 6.

⁵ 2 Bl. Com. *490, *491.

⁶ Genesis, chs. 15, 21, 23, 26, 48; Levit., ch. 25; Num., chs. 27, 36; Deut., ch. 21, v. 15-17.

⁷ Plutarch, *Solon and his Laws*, Trans. Sir Thomas North.

⁸ 4 Kent Com. *502.

⁹ 2 Bl. Com. *491; but see notes to contrary in Chitty's edition.

but the disposal of property by a form of will and to a limited extent, had undoubtedly been practiced before that time. The procedure, however, was not for the purpose of a general disposition of the dead man's property, but was one of several methods of transferring the representation of the household to a new head.¹⁰

§ 3. Ancient Purpose of Wills.

The early conception of a will was not that it was an instrument whereby property could be distributed according to desire. The laws of Solon forbade the disinheritance of direct male descendants. In Rome the will was regarded only as a means of better distributing the property of the deceased among his kindred than could be obtained under the rules of succession, and not for the purpose of passing the property outside of the family.¹¹

The principle of Family rights was so firmly imbedded in the minds of the Romans that they did not conceive of a will as a method whereby the Family could be disinherited or property inequitably distributed. The law of the Twelve Tables granted the power of testamentary disposition only in the event of the failure of children or proximate kindred. Disinheritance of heirs was not prohibited because it was not contemplated. Laws restricting the use of wills for such a purpose developed with the use itself.¹²

The later Rabbinical jurisprudence allowed testamentary disposition only when, according to the Mosaic law, there were no kindred to succeed.¹³

§ 4. Creation of the True Idea of Wills.

To the Roman is given the credit for the creation of the true idea of wills, but it must be remembered that it

¹⁰ Maine, *Ancient Law*, ch. 6.

¹² Maine, *Ancient Law*, ch. 7.

¹¹ Maine, *Ancient Law*, ch. 6.

¹³ Maine, *Ancient Law*, ch. 6.

was a matter of slow growth. The early Roman will, by mancipation, "with the copper and the scales," being a symbolic purchase by the heir, founded upon the ancient Roman conveyance which existed long before the art of writing had come into common use, was neither secret nor revocable, and further, it took effect upon execution. At first being oral, at least five persons in addition to the testator and beneficiary, were required to view the ceremony, numbers and formality being deemed necessary to insure remembrance and to impress the memory with the importance of the affair. Under the foregoing conditions wills were naturally made only in contemplation of death, for if the testator recovered he could rule his household only through consent.¹⁴

Originally the conveyance and directions of the testator were viewed as a whole. When it became permissible to substitute a stranger in the place of the heir as the purchaser, secrecy became possible. Separating the transfer of property, which was a matter of form, from the wishes which the testator directed to be executed after his death, either orally before witnesses or set forth in a written instrument duly authenticated before witnesses, gave such additional importance to the instructions of the testator that wills became revocable. Gradually the spirit rather than the letter of the law became recognized and the old method of symbolic transfer to the heir slowly disappeared. Remnants of the old forms, however, continued far down into the Middle Ages.¹⁵

§ 5. Law of the Twelve Tables. Rules Under Justinian.

Testamentary disposition, prior to the Twelve Tables, did not include the right of giving legacies, but the broad scope of that portion relating to wills gave rise to the

¹⁴ Maine, *Ancient Law*, ch. 6.

¹⁵ Maine, *Ancient Law*, ch. 6.

doctrine that the inheritance might be burdened according to directions given by the testator, thus the heir might receive the inheritance subject to the payment of legacies. The value of exact and positive proof of the behests of the testator was therefore noticed, and written testaments assumed a new importance as a means for the prevention of fraud.

There is a conflict of authority as to whether or not the law of the Twelve Tables allowed females to inherit under the rules of succession.¹⁶ The broken text of that portion of the law which has come down to us is not decisive. Kinship under the ancient Family was traced through the male line only. Females upon marriage passed into the family of the husband and therefore kinship as well as the right of inheritance was lost in the Family to which they were connected by blood ties. We find, however, that long after the Twelve Tables, laws were passed to exclude women from the right of inheriting, but these laws were later abrogated or evaded. At whatever time the various changes may have taken place, under the reign of Justinian all distinction was removed and males and females became equally entitled to the right of succession, lineal descendants were preferred to collateral kindred, and the order of succession became very similar to that which prevails in America today.

¹⁶ Chancellor Kent, 4 Com. *378, says that under the law of the twelve tables, male and female children were equally entitled to succeed, but that under the Prætors the right of females to inherit was fettered. Sir Henry Maine, *Ancient Law*, ch. 7, says that under the early civil law of Rome, the time not being fixed, upon the

death of a citizen leaving no will, his property was inherited by the following classes in their respective order: First, unemancipated children; if there were none, then the nearest grade of kindred through the male line; and this class failing, then all those of the same name as the deceased who, through sacerdotal fiction, were

The 118th novel of Justinian is the foundation of English and American statutes of distribution of estates of intestates.¹⁷

§ 6. Influence of Feudalism.

With the growth of feudalism and the development of the doctrine of primogeniture, the rules of the Civil Law relating to succession were largely overthrown. Under the feudal system, a period of social retrogression and decline of civil authority, lands were held under military tenure, the duty of rendering military service being a condition annexed to the grant. There was also the necessity of keeping the estate intact for purposes of offense and defense, so each feudal lord became the head of a consolidated family. To preserve these features of feudalism, the eldest son, being the one first able to render service, was preferred in the order of succession. Females were deprived of the right of succession for the reason that they could not render military service and also because, through marriage, the feudal estate might pass to strangers or enemies.¹⁸

§ 7. Early Rules in England.

In England, before the Norman Conquest, lands could be devised by will¹⁹ unless restricted by rights of the assumed to be of the same gens and descended from the same common ancestor as the deceased; that emancipated children (those freed from parental control) and relatives through female descent were excluded. Justice Blackstone, 2 Com. *210, says, by the laws of Rome, in the first place, children or lineal descendants were preferred; on the failure of these, the father and mother or lineal ascend-

ants succeeded together with the brethren and sisters, though by the law of the twelve tables the mother was originally, on account of her sex, excluded.

17 1 Kent Com. *542; 4 Kent Com. *378.

18 4 Kent Com. *382, *383; Maine, Ancient Law, ch. 7; 2 Bl. Com. *214-216.

19 2 Bl. Com. *373.

family specially mentioned in the grant or title-deed.²⁰ With the introduction of the system of military tenure, restraint was placed upon the alienation of lands either by grant during the life-time of the holder or by devise after his death. The power of testamentary disposition did not yield to the demands of feudalism as soon as did that of alienation during the life-time, and restrictions upon the right of devising came last in point of time.²¹

Alienation, however, could take place with the consent of the lord.²² Magna Charta, affirmed in 1215 and again confirmed, with additional alterations, in 1217, provided, among other things, that no freeman should lawfully alienate so much of his land as to leave him unable to perform his services to the lord of the fee, and that one-third of all lands belonging to the husband during coverture should go to the widow as her dower unless she had at marriage been endowed with a smaller portion. It also placed a check upon alienations in mortmain.²³

§ 8. Effect of Military Tenure in England.

Under the system of military tenure in England, the highest class of which was tenure by knight-service, whereby lands were granted by, dependent upon, and *holden* of some superior lord, certain prerogatives were vested in the over-lord, viz., aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat.²⁴ It is not necessary to describe in detail these consequences incident to tenure in chivalry²⁵ further than to say that they were incompatible with either the free

20 2 Stubbs Const. Hist. Eng.,
ch. 15, p. 188.

21 4 Kent Com. *504.

22 4 Kent Com. *504; 2 Bl. Com.
*373.

23 Lingard Hist. of Eng.

24 2 Bl. Com. *62, *63.

25 2 Bl. Com. *63, *74, contains
a description of the seven conse-
quences of military tenure.

alienation of lands by the holder during his lifetime or a disposition thereof taking effect after his death. These prerogatives, however, were gradually modified and abolished as the feudal system decayed, until in 1660, upon the restoration of Charles II, military tenure, with its accompanying rights and obligations, was abolished.²⁶

§ 9. Right to Bequeath Personal Property Early Recognized

The power of bequeathing personal property, in varying degrees, seems to have existed in England from the earliest times.²⁷ The early rule was that a man's personal estate was divided into three equal parts, one passing to his heirs or direct descendants, one to his wife or in the absence of a surviving wife, to his children, the remaining portion being subject to his disposition. If he left no surviving wife or issue, the whole could be bequeathed. The portions allotted to the wife and children were called their *reasonable parts*, and were recoverable by the writ *de rationabili parte bonorum*.²⁸ This was the law at the time of Magna Charta which in itself provided for the payment of the king's debts and the saving to the wife and children of their reasonable shares.²⁹ Blackstone is of the opinion that the rule was

²⁶ 12 Charles II, ch. 24; 2 Bl. Com. *77.

²⁷ 2 Bl. Com. *491.

²⁸ 2 Bl. Com. *491, *492.

²⁹ Magna Charta (1215), art. 26, provides as follows: "If any one holding of us a lay-fee shall die, and the sheriff, or our bailiffs, can show our letters patent, containing our summons for the debt which the dead man did owe us, it shall be lawful for the sheriff or our bailiff to attach and inroll

the chattels of the dead, founded upon his lay-fee, to the value of the debt, by the view of lawful men, so, however, that nothing shall be removed until our whole clear debt be paid: and the rest shall be left to the executors to fulfil the testament of the dead, and if there be nothing due from him to us, all the chattels shall go to the use prescribed by the dead, saving to his wife and children their reasonable shares."

part of the common law, but cites Coke as holding it a local custom. At all events it appears to have gradually disappeared until all personal property could be freely bequeathed.³⁰

§ 10. Early Distinctions Between Deeds and Devises.

Restrictions upon the alienation of real property by deed were removed long before there was relief from the restraint against testamentary disposition of land, the latter continuing for some centuries thereafter.³¹ There were reasons for this difference. A devise of lands was in effect a transfer which took effect after death. Freehold estates could not commence *in futuro* because there could be no livery of seisin.³² Devises were viewed with suspicion because of the fear that the testator *in extremis* might be imposed upon. Transfers by deed took effect at once; they were open, of general notoriety, accompanied by the public designation of the successor and the livery of seisin, and the corporeal possession was, by a symbol, actually delivered. A devise lacked all such attributes.³³

§ 11. Doctrine of Uses, Its Introduction and Purpose.

The statutes of mortmain which limited the right of ecclesiastical corporations of holding the legal title to lands, caused the ecclesiastics to introduce the doctrine of uses into England.³⁴ The simplicity of the common law could recognize no estate in lands not connected with

³⁰ 2 Bl. Com. *492, *493.

³¹ 2 Bl. Com. *374, *375.

³² 2 Bl. Com. *314; 4 Kent Com. *291.

³³ 2 Bl. Com. *375.

³⁴ 4 Kent Com. *290, *293; 2 Bl. Com. *328, *375.

Chancellor Kent, 4 Kent Com. *293, says: "Uses were descendible, according to the rules of the common law, in the case of inheritances in possession. They were also devisable, as they were only declarations of trust binding in

legal seisin and possession, and the idea of uses was therefore borrowed from the civil law.³⁵ The *fidei-commissum* of the civil law furnished the idea for the doctrine of uses more than the *usus fructus*, the latter being the temporary right to use something. *Fidei-commissum* was usually created by will, having been adopted by testators to defeat the law which precluded exiles and strangers from being beneficiaries under wills. The inheritance was disposed of to some one competent to receive it, in trust to convey the profits according to the wish of the person whom the testator desired should receive the benefit. At first it was binding only in conscience until the Emperor Augustus directed the *prætor* to afford relief to the *cestui que use*. This gave rise to a new division of rights under the civil law, the *jus*

conscience; and Lord Bacon, in opposition to Lord Coke, who in Chudleigh's Case had put the origin of uses entirely upon the ground of frauds invented to elude the statutes of mortmain, maintained that uses were introduced to get rid of the inability at common law to devise lands (Bacon Law Tracts 316). It is probable that both these causes had their operation, though the doctrine of uses existed in the civil law, and would naturally be suggested in every community by the wants and policy of civilized life." Justice Blackstone, 2 Com. *328, *329, says the notion of uses was transplanted into England about the close of the reign of Edward III, by means of the foreign ecclesiastics, for the purpose of evading the statute of mortmain, but hav-

ing once been introduced, however fraudulently, it afterward continued to be often innocently, sometimes laudably, applied to a number of civil purposes, particularly as it removed the restraint of alienations by will.

³⁵ Bacon on Stat. of Uses, Law Tracts 315: "I find that in the civil law that which cometh nearest in name to the use is nothing like in matter, which is *usus fructus*; for *usus fructus* and *dominium* is with them as with their particular tenancy and inheritance. But that which resembleth the use most is *fidei commissio*; and therefore you shall find in Justinian, lib. 2, that they had a form in testaments to give inheritance to one to the use of another, and the text of the civilians saith, that for a great time if the heir did not as

fiduciarium, or right in trust, as distinguished from *jus legitimum*, a legal right, and *jus precarium*, a precarious right enforceable only by entreaty.³⁶

§ 12. Effect of the Doctrine of Uses.

The innovation of the doctrine of uses was at first trivial, but the practice became general when adopted by the clergy during the reign of Edward III. It effected a mode of transferring land entirely different from the methods known to the old law. The ecclesiastics were masters of the civil law. Rights flowing from a use in land were proper matters of equity and naturally a favorable construction was given to uses by the judge of the Court of Chancery who at that time was generally a member of the clergy. The rules under which uses were first governed were likewise borrowed from the civil law. The same jurisdiction over uses was assumed by the chancellor as had vested in the *prætor fidei commissarius*; and in enforcing this jurisdiction the writ of subpoena of the common law courts was adopted to oblige the feoffee to attend in court and disclose his trust.³⁷

he was required, cestui que use had no remedy at all, until about the time of Augustus Cæsar, there grew in custom a flattering form of trust, for they penned it thus: *Rogo te per salutem Augusti, or per fortunam Augusti, etc.*; whereupon Augustus took the breach of trust to sound in derogation of himself, and made a rescript to the prætor to give remedy in such cases. Whereupon within the space of one hundred years, these trusts did spring and speed so fast, as they were forced to have

a particular chancellor only for uses, who was called prætor fidei commissarius; and not long after, the inconvenience of them being found, they resorted unto a remedy much like unto this statute; for by two decrees of senate, called *Senatus Consultum Trebellianum et Pegasianum*, they made cestui que use to be heir in substance."

³⁶ 2 Bl. Com. *327, *328; 4 Kent Com. *289, *290.

³⁷ 3 Reev. Hist. 192; 1 Cru. Dig. 393.

Under the doctrine of uses one person had the right to the rents and profits of land while the legal seisin and possession was in another. The owner of lands would convey them by feoffment, with livery of seisin, to some person competent to take the title, with a secret understanding that the lands should be held by the feoffee to the use of the feoffor or some other person. The feoffee took the legal title charged with the use which could be enforced in chancery.³⁸ A use could be created to commence *in futuro*, it was inheritable and could be devised by will.³⁹ A use could be created without notoriety; it could be alienated by any species of deed or writing, except a feoffment and livery, no words of limitation being necessary.⁴⁰ Uses, not being held in tenure, were not subject to the rules of the common law.

§ 13. Statute of Uses, Its Purpose.

This method of conveyance became very popular, with the consequence that many frauds against the legal rights of others were committed under its guise.⁴¹ To suppress uses as a means of evading the statutes of mortmain, the statute of 15 Richard II, ch. 5, was enacted, but the many other abuses continued. This led finally to the passage of the Statute of Uses, the preamble of the act setting forth the evils which it sought to correct. This statute executed the use; it converted the equitable interest of the *cestui que use* into a legal estate, transferring the possession to the use and wiping out the intermediate estate of the feoffee, making the *cestui que use* the legal

³⁸ 2 Bl. Com. *375.

⁴¹ 1 Sugden, Powers (1856) 78;

³⁹ 4 Kent Com. *293; Bacon on Uses 312; 2 Roll. Abr. 780.

1 Perry, Trusts, § 298; 2 Bl. Com. *331, *332.

⁴⁰ Gilbert, Uses and Trusts, *161; Shelley's Case, 1 Coke 93b, 101a.

as well as the equitable owner of the lands and tenements.⁴²

Opinions differ as to the purpose of the Statute of Uses, whether to entirely abolish uses, whether to take the jurisdiction of lands out of the court of chancery, or whether to convert equitable into legal estates. Whatever the design of the statute, it did not abolish uses, but only the intervening legal estate. It did, however, bring forth new methods of conveyance which were contrary to the rules of the old law, for it became necessary only to raise a use in order to convey lands without livery of seisin or record. There were other consequences. As the *cestui que use* had the legal title, the courts of the common law assumed jurisdiction; and as the seisin of the *cestui que use* made the use and the land one and the same, the land could not be devised by will and was subject to the rights of dower, curtesy and escheat.⁴³

§ 14. Statute of Uses, Its Effect.

Uses, however, were not destroyed by the Statute of Uses. The peculiar qualities of conveyances to uses caused judges, in construing them, to depart from the strict and simple rules of the common law.⁴⁴ The statute was strictly construed by the courts of law. It was held, for instance, that the statute executed only those uses which were *in esse*, and therefore did not execute contingent or springing uses, executory devises or powers over uses, all of which were foreign to the notions of the common law; also that a use limited upon a use was void and the statute would execute only the first use.⁴⁵ The stat-

⁴² 27 Henry VIII, ch. 10 (A. D. 1535); 2 Bl. Com. *333, *375; 4 Kent Com. *294.

⁴³ 2 Bl. Com. *333; 4 Kent Com. *294.

⁴⁴ 2 Bl. Com. *334.

⁴⁵ Gilbert, Uses and Trusts, *161; Daw v. Newborough, Comyns 242; Burchett v. Durdant, 2 Vent. 311; Chudleigh's Case, 1

ute did not include terms for years or chattels real because the holder of the term was not seized.⁴⁶ But although the statute did not execute such uses, yet there was a trust which should be fulfilled; therefore equity stepped in and held that although such uses were void at law, they were good in equity. Thus uses disappeared and in their place arose the system of trusts as it now exists.⁴⁷

§ 15. Statute of Wills Enacted Under Henry VIII.

The Statute of Uses, as has been shown, prevented lands from being devised by any of the forms which the act covered. What the ultimate effect would have been is unknown, for five years later, A. D. 1540, the Statute of Wills was enacted.⁴⁸ This law granted the

Coke 120a, 126a, 136b; Tyrel's Case, Dyer 155a; Hopkins v. Hopkins, 1 Atkyns 581, 591; Wyman v. Brown, 50 Me. 139, 157; Croxall v. Shererd, 5 Wall. 268, 282, 18 L. Ed. 572.

⁴⁶ Bacon, Law of Uses, 335; Dyer 369a.

⁴⁷ 4 Kent Com. *302; 2 Bl. Com. *336; Hopkins v. Hopkins, 1 Atkyns 581, 591.

⁴⁸ 32 Henry VIII, ch. 1, entitled "The act of wills, wards and primer seisins, whereby a man may devise two parts of his land." This was followed by the statute of 34 and 35 Henry VIII, ch. 5, entitled "The bill concerning the explanation of wills." Various statutes were subsequently enacted which dealt with the subject of wills. It would serve no beneficial purpose to set them

forth in full, therefore they will be referred to only by title. They are the statute of 10 Charles II, sess. 2, ch. 2, entitled "An act how lands, tenements, etc., may be disposed by will or otherwise, and concerning wills and primer seisins"; sections 5, 6, 12, 19, 20, 21 and 22 of the statute of 29 Charles II, ch. 3, entitled "An act for prevention of fraud and perjuries"; a portion of the statute of 7 William III, ch. 12, entitled "An act for prevention of fraud and perjuries"; section 14 of the statute of 4 and 5 Anne, ch. 16, entitled "An act for the amendment of the law and the better advancement of justice," and the statute amending the same, 6 Anne, ch. 10, which related to witnesses to nuncupative wills; section 9 of the statute of 14 George II, ch. 20, en-

right to all persons seized of lands in fee-simple, except married women, infants, idiots and those of non-sane memory, by a will and testament in writing, to devise to any other person two-thirds of their lands held in military tenure and all their lands held in socage. Corporations were precluded from being devisees in order to prevent gifts in mortmain. This restriction on corporations was modified by the construction given the statute

titled "An act to amend the law concerning common recoveries, and to explain and amend an act made in the twenty-ninth year of the reign of King Charles the Second, entitled 'An act for prevention of frauds and perjuries,'" which related to estates pur autre vie; the statute of 25 George II, ch. 6, entitled "An act for avoiding and putting an end to certain doubts and questions relating to the attestation of wills and codicils concerning real estates in that part of Great Britain called England, and in his Majesty's colonies and plantations in America, except so far as relates to his Majesty's colonies and plantations in America"; the statute of 25 George II, ch. 11, entitled "An act for the avoiding and putting an end to certain doubts and questions relating to the attestation of wills and codicils concerning real estates"; and also the statute of 55 George III, ch. 192, entitled "An act to remove certain difficulties in the disposition of copyhold estates by will." The above mentioned statutes, or the portions thereof which related to testa-

mentary dispositions of property, were repealed by the Statute of Wills, 1 Vict., ch. 26, and are especially enumerated therein. The last mentioned statute was passed A. D. 1837, long after the independence of these United States, and after the various colonies and states had enacted laws regarding the testamentary disposition of property. Many of the provisions of the Statute of Wills, 1 Vict., ch. 26, were taken directly from the earlier statutes on the same subject; but laws regarding wills were adopted in the United States long prior thereto and were based upon the earlier statute of Henry VIII, ch. 5, and the acts which followed, explained or modified or extended it. In speaking of the original Statute of Wills, we find the following note in Kent's Commentaries: "The statute of wills, or a substitute for it, has been adopted throughout the United States; but not its preamble, either in letter or spirit. That preamble is a curiosity, as being a sample of the most degrading and contemptible servility and flattery that ever were heaped

43 Eliz., ch. 4, it being held that a devise to a corporation for a charitable use was not a bequest, but was in the nature of an appointment and valid.⁴⁹ This construction was changed by a subsequent statute.⁵⁰ Upon the restoration of Charles II, military tenures, with the accompanying prerogatives of the over-lord, were abolished,⁵¹ and from that time the right of devising freehold estates in lands was fully recognized in England.

The Statute of Wills was passed in 1540, while military tenures were not abolished until 1660, so the feudal law in all its strictness existed in England for more than a century after the Statute of Wills was passed. Under the feudal law a tenant could not alienate his estate without the consent of the lord, this feature being a necessary element of the system in order that the lord might be secure in a tenant who could render him proper service. The right to devise was opposed to the ideas of the feudal system and for more than a century the Statute of Wills had to contend with this adversary and with the principles which it had made a part of the law of England.

§ 16. Statutes of Uses and of Wills as Affecting the Construction of Wills.

There has been some conflict of opinion as to whether a devise to use should take effect according to the Statute of Wills, or whether it should be construed according to the rules laid down under the Statute of Uses. Justice Blackstone says that a will of lands made under the statutes granting that right, was considered by the courts of law more as a conveyance declaring the uses to which

by slaves upon a master."—4 Kent
Com. *504, note c.

50 9 Geo. II, ch. 36.

51 12 Charles II, ch. 24 (A. D.

49 Flood's Case, Hobart 136.

1660).

I Com. on Wills—2

the land should be subject than in the nature of a testament, with the difference that witnesses to deeds were not required to subscribe the instrument as in the case of wills. He further says that the distinction between devises of land and testaments of personal property was founded upon the idea that a devise was a species of conveyance; that while the latter disposed of all personal chattels the testator owned at the time of his death, devises of real estate operated only on lands owned at the time of the execution of the will and not on after-acquired real property unless the will was republished.⁵² Mr. Jarman states the better opinion is that a devise to uses operates by force of the Statute of Wills concurrently with the Statute of Uses.⁵³ Mr. Washburn says that "estates created by will are governed by the rules derived from the Statute of Uses, the legal estate being transferred to the use in the same mode as by the operation of that statute."⁵⁴ It has been shown that the Statute of Wills gave the right to devise lands and the construction of the statute is that the intent of the testator, if lawful, should be carried out; but the law also supported conveyances to use on the supposed intent of the party.⁵⁵ The

⁵² 2 Bl. Com. *378, *379; *Arthur v. Bokenham*, 11 Mod. 148; *Bunter v. Coke*, 1 Salkeld 237; *Butler and Baker's Case*, 3 Coke 25a; *Brydges v. Duchess of Chandos*, 2 Ves. Jun. 417, 427; *Broome v. Monck*, 10 Ves. Jun. 597, 605; *Pigott v. Waller*, 7 Ves. Jun. 98; *Miles v. Bowden*, 3 Pick. (Mass.) 213; *Kip v. Van Courtland*, 7 Hill (N. Y.) 346. (Note—This rule of the common law that a will devising lands generally did not include real property subsequently acquired, was changed in England by the Statute

1 Vict., ch. 26, and in the United States by statutes in nearly all of the various states.)

⁵³ 2 Jarman, Wills, *1137, *1138.

⁵⁴ 2 Washburn, Real Prop. (6th ed.), § 1394.

⁵⁵ *Arthur v. Bokenham*, 11 Mod. 148, 154: "Wills should receive such a construction as conveyances by way of use, and they should imitate such conveyances, because it appears that that Act of Parliament of Wills (32 Hen. VIII, ch. 1), was made to supply the powers of declaring uses by

principles laid down under the Statute of Uses were affected by the intent of the testator, the question arising as to whether feoffee to use or trustee had an active duty to perform in connection with the property devised, or whether he was merely a passive link in the chain of title. In the first instance a trust obligation was imposed which it was the duty of the trustee to fulfill, while in the other case the statute could execute the use. It therefore appears that the Statute of Wills gave the right to devise lands which passed according to the rules laid down under the Statute of Uses, influenced and modified by the construction of the statutes granting the power. In some of the United States the Statute of Uses has been held to be inoperative because legislative enactment has limited all uses and trusts to those specifically allowed; in other states it has been accepted either as a part of the common law or by re-enactment, at least to the extent of executing a passive trust.

§ 17. Statute of Frauds, Its Purpose.

The prevention of fraud in connection with the alienation of lands by deed or devise, led to the Statute of Frauds.⁵⁶ Before this most any writing of a person might be allowed as a will. This statute required that all devises of lands⁵⁷ should be in writing, signed by the testator or by some one for him and at his request and in his presence, and should be subscribed by three or four credible witnesses in his presence. Revocation could be accomplished only by some written will or codicil or

men's last wills and testaments, which they had before the Statute 27 Hen. VIII, ch. 10, of Uses." See, also, Gilbert, Uses and Trusts, *162; Vernon's Case, 4 Coke 1a,

4a; Burchett v. Durdant, 2 Vent. 311, 312.

⁵⁶ 29 Charles II, ch. 3 (A. D. 1677).

⁵⁷ Nuncupative wills were so re-

other writing declaring the same, or by burning, cancelling, tearing or obliterating the devise by the testator himself or by some one in his presence and at his direction and with his consent. It was at first held that neither legatees nor creditors, where legacies or debts might be a charge upon the lands of the deceased, were competent witnesses to a will; this, however, was changed by the statute which allowed legatees and creditors to be witnesses, but declared that legacies to witnesses were void.⁵⁸

§ 18. Testaments of Chattels Under the Statute of Frauds.

The Statute of Frauds, by its fifth section (29 Charles II, ch. 3, A. D. 1677), prescribed certain formalities with respect to the signing and attestation of witnesses to devises of lands, but testaments of personal property were not included in its scope. Until subsequently required by statute, a testament of personal property needed no witnesses of its publication. If in the testator's handwriting, providing of course there was sufficient proof of that fact, a will of chattels was good even though it did not bear the testator's name or seal and no witnesses were present at its publication.⁵⁹ Such a testament was likewise valid even if written by another and not signed by the testator, providing it could be shown to have been according to his instructions and approved by him.⁶⁰

§ 19. Statute of Wills Enacted Under Queen Victoria.

The Statute of Wills⁶¹ enacted in the first year of the reign of Queen Victoria repealed all former acts in con-

stricted by the statute as to be in effect inhibited; however, soldiers in actual service and mariners at sea could dispose of personal property the same as before.

⁵⁸ 25 Geo. II, ch. 6 (A. D. 1752).

⁵⁹ Godolph, p. 1, ch. 21; Gilb. Rep. 260.

⁶⁰ Limbery v. Mason and Hyde, 2 Comyns 452-454.

⁶¹ 1 Vict., ch. 26 (A. D. 1837).

flict with it. It referred to both real and personal property of which the testator might be seized or possessed at the time of his death. It prescribed that no will could be made by a person under the age of twenty-one years,⁶² or by a married woman;⁶³ that the will had to be in writing, signed at the end thereof by the testator or by some other person in his presence and at his direction; that such signature be made or acknowledged by the testator in the presence of two or more witnesses who had to attest and subscribe the will in the testator's presence;⁶⁴ that soldiers in actual military service and mariners at sea could dispose of personal property as before;⁶⁵ that all devises or bequests in favor of subscribing witnesses, their husbands or wives, or any person claiming under them, were void, but the validity of the will otherwise was not necessarily affected;⁶⁶ that creditors⁶⁷ and executors⁶⁸ were competent witnesses; that every will was revoked by the subsequent marriage of the testator except certain wills made in the exercise of a power of appointment;⁶⁹ that wills were not revoked because of any presumption of an intention on the ground of alteration of circumstances;⁷⁰ that revocation could only be accomplished by a writing executed with like formality or by destroying the will with the intention to revoke.⁷¹

§ 20. Military Tenure Never Recognized in the United States.

In the United States military tenures or the principles growing out of the feudal system have never been recog-

⁶² Id., § 7.

⁶³ Id., § 8.

⁶⁴ Id., § 9.

⁶⁵ Id., § 11.

⁶⁶ Id., § 15.

⁶⁷ Id., § 16.

⁶⁸ Id., § 17.

⁶⁹ Id., § 18.

⁷⁰ Id., § 19.

⁷¹ Id., § 20.

nized as a part of the common law and therefore have not influenced the law of wills. The power of testamentary disposition exists generally without limitation as to the character of the property. Restrictions as to the manner of execution, the age and mental capacity of the testator, and the like, are regulated by the statutes of the various states, but are founded upon the legislation of England except where the civil law has exerted its influence, as in Louisiana where the rules have been adopted from the French Civil Code which in turn was based on the Roman law.

§ 21. Testamentary Disposition a Statutory Power.

In considering the subject of wills, while the power of disposing of property by will exists generally with but few limitations, this power is neither a natural nor a constitutional right, but depends wholly upon statute and may be conferred, regulated, limited or taken away, in whole or in part, by legislative enactment.⁷²

⁷² *Brettun v. Fox*, 100 Mass. 234.

CHAPTER II.

THE NATURE OF WILLS AND DEFINITIONS OF TERMS.

- § 22. Definition of the term "will."
- § 23. Definition of the term "codicil."
- § 24. Common use of the term "last will and testament."
- § 25. Early conception of the term "testament."
- § 26. Alienation of real and personal property governed by different rules.
- § 27. Construction of the Statute of Wills enacted under Henry VIII.
- § 28. A devise of lands did not transfer real property acquired subsequent to its execution.
- § 29. Feudalism caused wills of land to be viewed differently from those of personalty.
- § 30. Changes wrought by the Statute of Wills, 1 Vict., ch. 26.
- § 31. The definition of various terms.

§ 22. Definition of the Term "Will."

The definition of the term "will" must necessarily be short, otherwise it would be simply a statement of particulars, yet it must be broad enough to include all classes of wills. The Roman lawyers defined the term as "the legal declaration of a man's intentions, which he wills to be performed after his death."¹ It would be difficult to improve on this definition, for "legal declaration" means that the directions given must be in the form required by law, and "intentions" refers to a true intent which necessitates a sound mind and memory unaffected by fraud, duress or undue influence.

¹ 2 Bl. Com. *499. Modestinus thus expressed it: "Testamentum est voluntatis nostræ justa sententia de eo, quod quis post mortem suam fieri velit."—Dig. 28, l. 1.

Chancellor Kent says "a will is a disposition of real and personal property to take effect after the death of the testator."² A will might more appropriately be said to be the instructions as to the manner of the disposition, yet the definition is still objectionable because a will does not necessarily dispose of property. If the testator, in legal form, merely nominates an executor without giving a legacy or devising any part of his estate, he nevertheless has made a will.³ The definition also lacks the features of "legal declaration" and "intent." Mr. Jarman says "a will is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is in its own nature ambulatory and revocable during his life."⁴ Although a will is generally in the form of a written instrument, yet there is the oral or nuncupative will which is not included in the definition. The objections given will also apply to other definitions, such as: "A last will and testament may be defined, as the disposition of one's property, to take effect after death,"⁵ or "a will or testament is a lawful voluntary disposition, of property, to a competent donee, by any one competent, and to take effect upon the death of the testator, unless sooner revoked."⁶

A definition of the term "will" should include all features without involving details. First comes the intent, which must be true and lawful. If the will is revoked, the intent ceases to exist. It must be the intent of a person authorized by law to make a will. The intent must

² 4 Kent Com. *501.

³ O'Dwyer v. Geare, 1 Sw. & Tr. 465; In re John's Will, 30 Ore. 494, 36 L. R. A. 242, 47 Pac. 341; Barber v. Barber, 17 Hun (N. Y.) 72; In re Hickman, 101 Cal. 609, 36

Pac. 118; Joliffe v. Fanning, 10 Rich. (S. C.) 186; Prater v. Whittle, 16 S. C. 40.

⁴ Jarman, Wills, *18.

⁵ 1 Redfield, Law of Wills, p. *5.

⁶ Rood, Wills, § 46.

be expressed in legal form, oral or written, as the case may be. The subject matter is the estate of the person, which estate can be affected by such intent properly expressed, only after the death of the testator. The term may be thus defined. A will is the lawful intent of a competent person, legally expressed, regarding his estate and effective after his death.

§ 23. Definition of the Term "Codicil."

A codicil is a supplement to a will. Its derivation is from the Latin *codicillus*, a diminutive form of *codex*, thus representing a small will. It must be executed with the same solemnity as a will. It is added to the will after its execution, the purpose usually being to alter, enlarge or restrain the provisions of the will, or to explain, confirm and republish it. It does not supersede the will, as an after made will would do, but is a part of it, to be construed with it as one instrument.⁷ It is not a revocation of the former will except to the extent that its provisions are inconsistent with it, unless the intent to revoke be expressed.⁸

§ 24. Common Use of the Term "Last Will and Testament."

The term "testament" is of Latin origin, from *testamentum*, or *testatio mentis*, or *testor*, according to varying authorities, but the conflict of opinion is immaterial since the ultimate meaning evolved is that it is final testimony of a party, or his declaration of intention or will. *Testamentum* or *testament* is the term we find exclusively used in the old Civil Law and by its early writers. The expression "will" is of English or Saxon origin

⁷ Green v. Lane, 45 N. C. 102; 371; Dunham v. Averill, 45 Conn. Lamb v. Lamb, 11 Pick. (Mass.) 61; 29 Am. Rep. 642.

⁸ 4 Kent Com. *531.

and its use is confined to those countries where English jurisprudence prevails either directly or as the foundation of the law. The expression, however, most commonly employed to designate the instrument which makes a testamentary disposition of real and personal property is that of "last will and testament."

§ 25. Early Conception of the Term "Testament."

A testament, strictly speaking, concerned only personal property and was under ecclesiastical jurisdiction. According to the Canon Law it might have been made by a person of the age of fourteen years. It was administered by an executor who could not act until granted letters testamentary.⁹ A testament, according to the Civil Law, was the appointment of an executor or testamentary heir according to prescribed formalities.¹⁰ By the Roman law the will constituted the heir and was the appointment of him. He was the same person as was afterward known in the English law as the executor. The nomination of an heir was so essential an ingredient of the Roman testament that there could be no complete will without him, and from his name and office he was considered, at the death of the testator, as the universal successor to all the rights and property of the deceased without regard or distinction as to whether the property had been acquired by the testator prior or subsequent to the time of making his will.¹¹ Under the early English law a testament was invalid unless an executor was appointed,¹² but the designation could be by express words

⁹ 2 Bl. Com. *501, *502; Conklin v. Egerton's Admr., 21 Wend. (N. Y.) 430.

¹¹ Hogan v. Jackson, 1 Cowp. 299.

¹² Swinburne, Wills, pt. 1, s. 3, 1. 19; 2 Bl. Com. *503; Woodward

¹⁰ Domat, pt. 2, liv. 1, tit. 1, s. 1.

or by implication where the same was strongly shown.¹³ This rule, however, has long since ceased to prevail, and in the event of the failure of the testator to appoint an executor, or the refusal or inability of the appointee to act, the court will grant letters of administration with the will annexed to some proper person.¹⁴

§ 26. Alienation of Real and Personal Property Governed by Different Rules.

Properly speaking the word "devise" means a testamentary disposition of lands.¹⁵ Real property could be disposed of by will only because of the permission given by statute. As to personal property, the law of England adopted the rules of the Roman testament, but a devise of land was considered in a different light from the Roman will. A will in the civil law was an appointment of the heir, but a devise in England was an appointment of particular lands to a particular devisee and was considered by the courts in the nature of a conveyance by way of appointment,¹⁶ or as a conveyance declaring the uses to which the land should be subject.¹⁷ It was a conveyance by statute, unknown to the feudal or common law and not subject to the same jurisdiction as were testaments of personal property.¹⁸ Because of this construction it was held that no man could devise lands which he did not own at the date of the publication of the will;

v. Lord Darcy, Plowden 184, 185:
"Without an executor a will is
null and void."

13 2 Bl. Com. *503.

14 2 Bl. Com. *503, *504; Bar-
ton's Estate, 52 Cal. 538; Brady v.
McCrosson, 5 Redf. (N. Y.) 431;
Smith v. Smith, 168 Ill. 488, 500,
48 N. E. 96.

15 Fetrow's Estate, 58 Pa. St.
424; Conklin v. Egerton's Admr.,
21 Wend. 430.

16 Harwood v. Goodright, 1 Cowp.
87, 90.

17 2 Bl. Com. *378.

18 2 Bl. Com. *501; Conklin v.
Egerton's Admr., 21 Wend. 430.

thus subsequently acquired real property would not be included.¹⁹ As to personal estate, however, a testament operated upon everything possessed by the testator at the time of his death.

§ 27. Construction of the Statutes of Wills Enacted Under Henry VIII.

The Statute of Wills, 32 Henry VIII, ch. 1, provided that every person "having" any manors, lands, tenements, or hereditaments, etc., should have "full and free liberty, power and authority" to give, dispose, will, and devise, as well by his last will and testament, in writing, or otherwise by act or acts lawfully executed in his life, all his said manors, lands, tenements or hereditaments, or any of them at his free will and pleasure; any law, statute, or other thing heretofore had, made, or used, to the contrary notwithstanding. The statute of 34 Henry VIII, ch. 5, which explained the former act, used the words "having a sole estate" or interest in fee simple of and in any manors, lands, rents, or other hereditaments, in possession, reversion or remainder. The amount of the estate "holden of the king's highness in chief by knight service or of the nature of knight service in chief" that was devisable under the statutes was as much as should amount to the yearly value of two parts in three parts to be divided, saving and reserving to the king as much of the same as should amount and extend to the full and clear yearly value of the third part thereof.

In construing these statutes considerable importance was given to the wording of the acts. It was decided that

¹⁹ Hogan v. Jackson, 1 Cowp. 361. (Note—This rule was abolished by statute, 1 Vict., ch. 26, § 3.)
299; Bunter v. Coke, 1 Salkeld
237; Arthur v. Bokenham, 11 Mod.
148; Pistol v. Riccardson, 3 Doug.

the word "having" imported ownership and time of ownership, therefore the devisor ought to have the land at the time of the making of the will.²⁰ It was held that the word "sole" required that the testator have the sole estate in the land, in the part which he left to descend to his heir as well as in the land which he devised. The right of devising two parts of a clear yearly value was construed to mean that if the inheritance was not of any annual value it should not be devisable under the statute.²¹

The words "shall have full and free liberty, power and authority, by will, to devise of two parts of said manors," were held to have shown that the act intended to give the right to devise, but that without question an estate which could not under the rules of the common law be conveyed by an act executed by the owner in his lifetime under advice of counsel learned in the law, could not be devised by the will of a man who is intended in law to be without advice of counsel.²²

§ 28. A Devise of Lands Did Not Transfer Real Property Acquired Subsequent to Its Execution.

That a devise did not transfer lands acquired after its execution was the settled law in England from a very early date, and it has been held that the rule did not depend upon the construction of the Statutes of Wills, but that the rule prevailed prior to the statutes where lands were devisable by custom. The rules of the common law did not allow a person by any conveyance to dispose of lands in which he had no right or interest

20 *Bunter v. Coke*, 1 Salkeld 237;
Arthur v. Bokenham, 11 Mod. 148.

22 *Corbet's Case*, 1 Coke 77b,
 85b; *Butler and Baker's Case*, 3
 Coke 25a.

21 *Butler and Baker's Case*, 3
 Coke 25a; *Leonard Lovies's Case*,
 10 Coke 78a, 84a.

at the time of making and executing the conveyance.²³ Although a will did not take effect until the death of the maker, yet the law required many qualifications of the testator at the time of the making of his will. As to the vesting of the estate in the devisees, the law had regard only for the time of the death of the party, for no estate could vest in a devisee during the life of the testator. But consideration had to be given to the fact that the law required power and capacity to make a will, and as to such requirements the law had regard to the time of execution. Therefore if a party had nothing to dispose of, he could not be said to have had the power of disposing of it, for he must have had the interest in the thing to be disposed of as well as the power of disposition.²⁴

The ownership of the testator was required by the law to continue to the time of his death, for any alteration in his interest was an actual revocation.²⁵ The republication of a will, executed with all proper solemnities, was in effect a re-execution and the will was effective as of such date. A codicil, duly attested, annexed to the will or referring to it, even though it expressed no intention to republish the will and though it related to personal property only, was taken as a part of the will and operated as a republication, so that lands acquired by the testator between the dates of the will and the codicil

²³ *Arthur v. Bokenham*, 11 Mod. 148; *Bunter v. Coke*, 1 Salkeld 237; *Brydges v. The Duchess of Chandos*, 2 Ves. Jun. 417, 427; *Harwood v. Goodright*, 1 Cowp. 87; *George v. Green*, 13 N. H. 521.

²⁴ *Arthur v. Bokenham*, 11 Mod. 148; *Bunter v. Coke*, 1 Salkeld 237.

²⁵ *Butler and Baker's Case*, 3

Coke 25a; *Monypenny v. Bristow*, 2 Russ. & My. 117; *Thellusson v. Woodford*, 13 Ves. Jun. 209; *Arthur v. Bokenham*, 11 Mod. 148; *Brydges v. Duchess of Chandos*, 2 Ves. Jun. 417, 427; *Milnes v. Slater*, 8 Ves. Jun. 295, 305; *Broome v. Monck*, 10 Ves. Jun. 597, 605.

passed under the will.²⁶ If the testator devised his estates and effects, both real and personal, which he should die possessed of, interested in or entitled to, upon certain trusts for the benefit of an heir, and after the execution of the will he purchased lands, the heir could be required to elect whether he would claim the after acquired lands or the benefits under the will.²⁷

§ 29. Feudalism Caused Wills of Land to Be Viewed Differently from Those of Personalty.

When the feudal system prevailed in England, the common law appointed no heir on whom the personal property should descend, and if the owner died intestate, it went to the church. A testament was therefore the appointment by the testator of an heir to his personal property, the law not making such an appointment. The executor stood in the relation of the testator to such property and was entitled to all of it, the law not giving it to any other person. The only limitation upon his rights was that the property was subjected in his hands to the trusts of the testator.²⁸

As to lands under the feudal system, when feuds became inheritable the law appointed an heir who in his own right acquired an inchoate title upon the acquisition of an inheritable interest in land by his ancestor. He was the successor to the title, or heir presumptive. A

²⁶ Goodtitle d. Woodhouse v. Meredith, 2 Maul. & S. 5; Acherly v. Vernon, 1 Comyns 381; Potter v. Potter, 1 Ves. Sen. 437; Barnes v. Crowe, 1 Ves. Jun. 486; Pigott v. Waller, 7 Ves. Jun. 97; Miles v. Boyden, 3 Pick. (Mass.) 213; Kip v. Van Cortland, 7 Hill (N. Y.) 346.

²⁷ Churchman v. Ireland, 4 Sim. 520, affirmed in 1 Russ. & My. 250; but see City of Philadelphia v. Davis, 1 Wharton (Pa.) 490; Thellusson v. Woodford, 13 Ves. Jun. 209.

²⁸ George v. Green, 13 N. H. 521.

devise of lands, therefore, did not take effect in the same manner as a testament of personal property because the latter was the constitution of an heir, whereas the former disposed of lands which otherwise would have vested in the heir. A devise of lands was not an indefinite disposition of everything which the testator might own at his death, as was the case regarding personal property, but was an appointment of a person who should take the specific lands after the death of the person devising them. It was testamentary because fluctuating in its nature and not taking effect until after death, but it was in the nature of a conveyance by way of appointment.²⁹

The law appointing no heir to take the personal estate of a deceased was a reason why personal property acquired subsequent to the execution of a testament should pass by it, for if it was not transferred by the testament, it would remain uncertain as to who should take such personal estate. With real property no such uncertainty existed, for the law appointed an heir to take a freehold of inheritance upon the death of the ancestor. Even after the rigor of the feudal law had relaxed, it was held that a devise of lands would not include real property acquired by the testator after the making of his will because the common law did not comprehend a legal conveyance of what a man should acquire in the future.³⁰ This same rule formerly prevailed in the United States.³¹

²⁹ *Brydges v. Duchess of Chandos*, 2 Ves. Jun. 417, 427; *Howe v. Earl of Dartmouth*, 7 Ves. Jun. 137, 147; *Milnes v. Slater*, 8 Ves. Jun. 295, 305; *Broome v. Monck*, 10 Ves. Jun. 597, 605; *George v. Green*, 13 N. H. 521.

³⁰ *Hogan v. Jackson*, 1 Cowp. 299; *Bunter v. Coke*, 1 Salkeld 237.

³¹ *George v. Green*, 13 N. H. 521; *Brewster v. McCall's Devisees*, 15 Conn. 274; *Jackson v. Potter*, 9 Johns. (N. Y.) 312; *Hays v. Jackson*, 6 Mass. 149, 156; *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 312; *Minuse v. Cox*, 5 Johns. Ch. (N. Y.) 441, 9 Am. Dec. 313; *Ballard v. Carter*, 5 Pick. (Mass.) 112,

§ 30. Changes Wrought by the Statute of Wills, 1 Vict., ch. 26.

By the Statute 1 Vict., ch. 26, s. 3, it was declared lawful for every person to devise, bequeath, or dispose of, by his will executed in the manner required by the act, all real and personal estate which he should be entitled to, either at law or in equity, at the time of his death, notwithstanding that he may have become entitled to the same subsequent to the execution of his will. Statutes to this effect have been enacted in practically all of the states of the United States.

§ 31. The Definition of Various Terms.

A "devise," strictly speaking, means a testamentary disposition of lands, while "bequest" and "legacy" are words properly referring to such a disposition of personalty. A "legatee" is a person to whom a bequest is made.³² These words, when used in wills, are presumed to have been used in their legal sense unless from the context it clearly appears to the contrary.³³ It is an established principle of construction that in doubtful cases it is best to apply to such words their technical meaning, on the presumption that the testator used them in their legal sense. This rule, however, like all others, must give way if it clearly appears that he understood and used them in a more popular sense.³⁴ Where the in-

16 Am. Dec. 377; Varick v. Jackson, 2 Wend. (N. Y.) 166, 19 Am. Dec. 571.

³² Sheppard v. Duke, 9 Sim. 567; Fetrow's Estate, 58 Pa. St. 424; Browne v. Cogswell, 5 Allen (Mass.) 556; Probate Court v. Matthews, 6 Vt. 269; Nye v. Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429.

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³³ Coard v. Holderness, 20 Beav. 147; Thellusson v. Woodford, 4 Ves. Jun. 227, 329; Scholle v. Scholle, 113 N. Y. 261, 21 N. E. 84; Lasher v. Lasher, 13 Barb. (N. Y.) 106.

³⁴ Fetrow's Estate, 58 Pa. St. 424.

tention of the testator clearly appears, it will control the legal operation of the words, no matter how technical they may be.³⁵ Thus by force of the context of the will the word "legacy" has been held to apply to realty;³⁶ the term "devise" has been held to refer to personalty only;³⁷ the term "bequest" has been held synonymous with devise;³⁸ the "residuary legatee" has been held, by interpretation, to take the residue of both the real and personal estate;³⁹ and the word "effects" may include real estate if, from other expressions used in connection with the term, it would appear that such was the intention of the testator.⁴⁰ The expressions, however, which are found in wills, vary greatly in character, and the intention of one testator to be collected from one set of words offers no rule for discovering the meaning of another man who uses a different set of words.⁴¹

35 *Jesson v. Wright*, 2 Bligh 1; *Woollam v. Kenworthy*, 9 Ves. Jr. 137; *Hall v. Hall* (1892), 1 Ch. 361; *Doe v. Tofield*, 11 East 246; *Roe v. Pattison*, 16 East 221; *Ladd v. Harvey*, 21 N. H. 514.

36 *Hardacre v. Nash*, 5 T. R. 716; *Bacon v. Bacon*, 55 Vt. 243.

37 *Coope v. Banning*, 1 Sim. & Stu. 534; *Oothout v. Rogers*, 13 N. Y. Supp. 120.

38 *Dow v. Dow*, 36 Me. 211.

39 *Hardacre v. Nash*, 5 T. R. 716; *Day v. Daverson*, 12 Sim. 200; *Evans v. Crosbie*, 15 Sim. 600; *Laing v. Barbour*, 119 Mass. 523; *Evans v. Price*, 118 Ill. 593, 8 N. E. 854.

40 *Camfield v. Gilbert*, 3 East 516.

41 *Camfield v. Gilbert*, 3 East 516.

CHAPTER III.

CLASSIFICATION AND FORM OF WILLS.

- § 32. Written and oral wills.
- § 33. Four classes of written wills.
- § 34. The term "alternative" or "double" as applied to wills.
- § 35. No technical form is essential to the validity of a will.
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- § 47. The same subject: Notes of a will to be thereafter drawn up sometimes admitted to probate.
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- § 49. An instrument may be construed as a will although not so intended by its maker.
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- § 63. Courts will not violate the law by changing the express character of an instrument.
- § 64. The presumption arising where a will consists of several sheets.
- § 65. Other writings may be incorporated in a will by reference.
- § 66. The same subject: The writing must have been in existence and clearly referred to. Proof of identity is necessary.
- § 67. The same subject: Instances of sufficient reference and identification.
- § 68. The same subject: Instances of insufficient reference and identification.

§ 32. Written and Oral Wills.

Wills are divided generally into two classes, written and oral or nuncupative.¹ A written will, as the name implies, is a written document. It may be, and usually is, prepared by some one with a knowledge of the law, and executed according to prescribed formalities as to subscription by the maker and attestation by witnesses. If entirely written, dated and subscribed by the person whose estate is to pass, it is denominated a holographic or olographic will, witnesses not being required. A nuncupative will is defined to be an oral will declared in the presence of witnesses by a testator *in extremis* or under circumstances considered equivalent thereto, and afterwards reduced to writing.²

§ 33. Four Classes of Written Wills.

Written wills in the United States may be subdivided into four general classes, viz., joint, mutual or reciprocal wills, conditional or contingent wills, duplicate wills and Louisiana testaments. Agreements between parties to make a will have been sometimes dealt with under the head of joint or mutual wills, and although in many instances closely allied thereto, they more appropriately should be treated as compacts or contracts rather than as a class of wills. We also have wills which, by their terms,

¹ Hubbard v. Hubbard, 12 Barb. (N. Y.) 148; In re Hebden, 20 N. J. Eq. 473; Sykes v. Sykes, 2 Stewt. 364, 20 Am. Dec. 40; Tally v. But-
terworth, 10 Yerg. 502; Ex parte
Thompson, 4 Bradf. (N. Y.) 155;
Prince v. Hazelton, 20 Johns.
(N. Y.) 519, 11 Am. Dec. 307;
Stamper v. Hooks, 22 Ga. 606,

68 Am. Dec. 511; In re Morales,
16 La. Ann. 267.

² 2 Bl. Com. *500; Read v. Phil-
lips, 2 Phillim. 122; Gaskins v.
Gaskins, 3 Ired. 158; Watts v. Pub-
lic Admr., 4 Wend. 168; Ex parte
Henry, 24 Ala. 638; Devecmon v.
Devecmon, 43 Md. 335; Brown
v. Tilden, 5 Har. & J. 371; Nutt
v. Nutt, 1 Frem. Ch. (Miss.) 128.

become effective only at the election of a third person,³ but such testamentary documents might more properly be called conditional or contingent wills. Also there are wills which are made in the execution of a power, but such instruments are more strictly allied to the law of powers and trusts.⁴

§ 34. The Term "Alternative" or "Double" as Applied to Wills.

The term "alternative" has also been given to testamentary documents, as for instance where a testator executed one will, subsequently executed a second, then later by a codicil provided that if he should die before a certain day the first will should become effective, otherwise the second.⁵ Such instruments, however, might more properly be called conditional or contingent wills, as one or the other is to take effect upon the happening or not happening of a certain event. Testamentary documents have likewise been referred to as "double" wills, as where two parties in one instrument mutually agree that the survivor shall be the sole heir to all the estate of the other, but such a disposition would ordinarily be classified as joint, mutual or reciprocal wills.⁶

§ 35. No Technical Form Is Essential to the Validity of a Will.

No technical form is essential to the validity of a will, but if there is any irregularity in the writing propounded

³ Goods of Smith, L. R. 1 P. & D. 717.

⁴ Sing v. Leslie, 2 Hem. & M. 68; In re Eardley Wilmot, 29 Beav. 644; Jones v. Southall, 30 Beav. 187; Rich v. Cockell, 9 Ves. Jun. 369; Reid v. Shergold, 10 Ves.

Jun. 370; Heyer v. Burger, Hoffm. (N. Y.) 1.

⁵ In re Hamilton's Estate, 74 Pa. St. 69.

⁶ Evans v. Smith, 28 Ga. 98, 73 Am. Dec. 751; In re Cawley's Estate, 136 Pa. St. 628, 10 L. R. A. 93, 20 Atl. 567.

for probate, the court will scrutinize it carefully to ascertain "from the form of the paper, from its nature, contents, and appearance, whether it was written and intended as a formal permanent will," "or whether it was a deliberative and temporary paper, which expressed the impressions and wishes of the moment, and was never afterwards thought of, or adverted to."⁷ Although the paper may contain some technical expressions which might convey the idea of a testamentary intention, it is not considered in the nature of a will if it is to become operative at once.⁸ However, if the intention of the maker to dispose of his estate after his death be sufficiently manifested and this intention be lawful in itself, the writing, having been executed in accordance with the statutory formalities, will operate as a will whatever its form.⁹

§ 36. The Materials Used in the Making of Wills May Be of Various Characters, Permanency Being the Principal Requirement.

A will is not invalid by reason of being written in pencil,¹⁰ or being partly or wholly in print, lithographed,

⁷ *Passmore v. Passmore*, 1 Philim. 216; *Mathews v. Warner*, 4 Ves. Jun. 186.

⁸ *Thompson v. Johnson*, 19 Ala. 59; *Hamilton v. Peace*, 2 Desaus. (S. C.) 92; *Robey v. Hannon*, 6 Gill (Md.) 463; *Jones v. Morgan*, 13 Ga. 515.

⁹ *Lawson v. Lawson*, 1 P. Wms. 440; *Habergham v. Vincent*, 2 Ves. Jun. 204; *Hall v. Hewer*, Ambl. 203; *Robinson v. Schly & Cooper*, 6 Ga. 515; *Symmes v. Arnold*, 10 Ga. 506; *Mealing v. Pace*, 14 Ga. 596; *Allison v. Allison*, 4 Hawks

(N. C.) 141; *Leathers v. Greenacre*, 53 Me. 561; *Jackson v. Jackson*, 6 Dana (Ky.) 257; *Rohrer v. Stehman*, 1 Watts (Pa.) 442; *Wheeler v. Durant*, 3 Rich. Eq. (S. C.) 452; *Babb v. Harrison*, 9 Rich. Eq. (S. C.) 111, 70 Am. Dec. 203; *Ragsdale v. Booker*, 2 Strob. Eq. (S. C.) 167 (348 note); *Means v. Means*, 5 Strob. (S. C.) 167; *Jacks v. Henderson*, 1 Desaus. (S. C.) 543, 554; *Brown v. Schand*, 1 McCord (S. C.) 409.

¹⁰ *In re Dyer*, 1 Hagg. Ecc. 219; s. c., 3 Ecc. Rep. 92; *Dickenson v.*

or engraved.¹¹ But a writing on a slate was held in Pennsylvania not to be a good will.¹² The law requires only that a written will be in some permanent form and of such a character that fraudulent erasures and changes may be avoided. The instrument should show on its face that it was the final determination of the testator as to the disposition of his property and not a mere temporary note or memorandum. An act of such a solemn character as the execution of a will would naturally be consummated by using materials of a permanent character; yet on the other hand the exigencies of the case may have been such that the testator was limited in his choice of materials. All such surrounding circumstances are looked into by the courts to determine whether the testator intended the writing as a final disposition of his estate or a deliberative and preliminary to a more formal instrument.¹³ Thus where a printed form was filled in partly in ink and partly in pencil, and the writing in ink made sense with the form without help from the writing in pencil, part of which was written over by the ink, the writing in pencil was disregarded.¹⁴ And a printed re-

Dickenson, 1 Ecc. Rep. 222, s. c., 2 Phillim. 173; *In re Mundy*, Sw. & Tr. 119; s. c., 7 Jur. N. S. 52; *Mence v. Mence*, 18 Ves. Jun. 348; *Kell v. Charmer*, 23 Beav. 195; *Lucas v. James*, 7 Hare 419; *Harris v. Pue*, 39 Md. 535; *Myers v. Vanderbelt*, 84 Pa. St. 510, 24 Am. Rep. 227; *Estate of Knox*, 131 Pa. St. 220, 17 Am. St. Rep. 798, 6 L. R. A. 353, 18 Atl. 1021.

Compare: *Bateman v. Pennington*, 3 Moore P. C. C. 223; *Philbrick v. Spangler*, 15 La. Ann. 46.

¹¹ *In re Adams*, L. R. 2 P. & D. 367; *Dench v. Dench*, L. R. 2 Prob.

Div. 60; *Schneider v. Norris*, 2 Maule & S. 286; *Henshaw v. Foster*, 9 Pick. (Mass.) 312; *Temple v. Mead*, 4 Vt. 536.

¹² *Reed v. Woodward*, 11 Phila. (Pa.) 541.

¹³ *Rymes v. Clarkson*, 1 Phillim. 22, 35; *Parkin v. Bainbridge*, 3 Phillim. 321.

Compare: *Bateman v. Pennington*, 3 Moore P. C. C. 223.

¹⁴ *In re Adams*, L. R. 2 P. & D. 367. See, also, *Dickenson v. Dickenson*, 1 Ecc. Rep. 222, s. c., 2 Phillim. 173.

siduary clause not read to the testator forms no part of the will,¹⁵ although its presence does not invalidate the rest of the paper.¹⁶

§ 37. Experts May Decipher Illegible Writing or Interpret Foreign Words.

The writing of a will should, of course, be legible, but unfortunately the writing of many persons is very difficult to read, in which case it is proper to call in handwriting experts or persons familiar with the writing of the testator, in order to ascertain the words actually written. A will may be written in a foreign language; the testator may have been a foreigner residing abroad. The will is simply translated into English, the translation proved and filed of record. The original should likewise be filed for reference in the event of a subsequent dispute, otherwise the translated copy is the only one necessary to be considered and it can not thereafter be collaterally attacked.¹⁷

§ 38. The Language of a Will May Be Suggested by Others, but It Must Express the Intent of the Maker.

A written will must represent the final determination of the testator regarding the disposition of his property; he must sign it with a knowledge of its contents, but the fact that the phraseology of the instrument is according to the suggestions of his legal adviser,¹⁸ or contains words not used by the testator,¹⁹ does not invalidate the will.

¹⁵ *In re Duane*, 2 Sw. & Tr. 590; s. c., 8 Jur. N. S. 752.

¹⁶ *In re Oswald*, L. R. 3 P. & D. 162.

¹⁷ *Masters v. Masters*, 1 P. Wms. 421; *Caulfield v. Sullivan*, 85 N. Y. 153. Incorrect English does not

prevent a document being declared a will.—*In re Silva's Estate*, 169 Cal. 116, 145 Pac. 1015.

¹⁸ *Landry v. Tomatis*, 32 La. Ann. 113.

¹⁹ *Starrs v. Mason*, 32 La. Ann. 8.

The courts can not view differently the words which a testator uses himself in drawing up his will and the words which are in good faith used by one whom he trusts to draw it up for him. A will may be written in a language not understood by the testator, provided it be drawn in accordance with his instructions and executed with a knowledge of its contents. The situation is the same as in a case where the testator could neither read nor write and could only sign by making his mark. He must necessarily depend upon others to incorporate his intentions in the instrument. And the same rule applies where one is blind.²⁰ The attesting witnesses need not understand the language of the will, but they must be able to understand the language of the testator and of the attesting clause.²¹ Should a certain part of a will have been inserted therein through fraud, or perhaps inadvertence or mistake, it may be rejected and probate be granted to the remaining portions of the will if they are severable. But where the rejection of one part alters the sense of the remainder it is doubtful whether the instrument can be a valid will.²² Thus it was held that a natural daughter was not entitled to have the will of her father amended by striking therefrom the words "from and after the

²⁰ *Green v. Skipworth*, 1 Phillim. 58; *Masters v. Masters*, 1 P. Wms. 421, 425; *Landry v. Tomatis*, 32 La. Ann. 113; *Will of Walter*, 64 Wis. 487, 54 Am. Rep. 640, 25 N. W. 538. But see, also, *Miltenberger v. Miltenberger*, 78 Mo. 27.

²¹ *Adams v. Norris*, 23 How. (U. S.) 353, 16 L. Ed. 539; *Breaux v. Gallusseaux*, 14 La. Ann. 233, 74 Am. Dec. 430.

²² *Rhodes v. Rhodes*, L. R. 7 App. Cas. 192. See, also, *In re*

Duane, 2 Sw. & Tr. 590; s. c., 8 Jur. N. S. 752; *In re Oswald*, L. R. 3 P. & D. 162. If valid and invalid portions of a will are inseparably connected in a general scheme, so that the elimination of the invalid portion would destroy the scheme, all must fail; but if they can be separated and the valid portion will still give effect to the general plan of the will, it will be admitted to probate.—*Carpenter v. Hubbard*, 263 Ill. 571, 105 N. E. 688.

decease of my said wife without leaving issue of our said marriage," although such words were inserted by the party who drew up the will for the maker without reason and without direction and even although their effect had not been intelligently appreciated by the testator.²³

§ 39. It Is Not Necessary That the Testator Use Words of Command or Direction.

It is not essential that the maker of a will should use words of command or of direction; but polite forms of expression employed by testators,²⁴ words of recommendation,²⁵ request,²⁶ and conjuration,²⁷ have been often construed as equivalent to words of command. Where such indirect language is used, the question to be determined in each case is whether the wish, desire, or recommendation expressed by the testator is meant to govern the conduct of the one to whom it is addressed or whether it is intended merely as an indication of what the testator thinks would be a reasonable exercise of the discretion of the party, leaving him at liberty, however,

²³ *Rhodes v. Rhodes*, L. R. 7 App. Cas. 192.

²⁴ *Brunson v. King*, 2 Hill Ch. (S. C.) 490; *Carle v. Underhill*, 3 Bradf. (N. Y.) 101; *In re Easton*, 6 Paige (N. Y.) 183.

Compare: *Knight v. Broughton*, 11 Clark & F. 513.

²⁵ *Pierson v. Garnet*, Finch 201n.

²⁶ *In re Mundy*, Sw. & Tr. 119; s. c., 7 Jur. N. S. 52; *In re Wood*, 36 Cal. 75; *Morrell v. Dickey*, 1 Johns. Ch. (N. Y.) 153; *Miars v. Bedgood*, 9 Leigh (Va.) 361.

²⁷ *Winch v. Brutton*, 8 Jur. 1086:

"The word 'leave' is often used in reference to property disposed of by will, but the word is frequently loosely used and it should not be given controlling importance."—*Innes v. Potter*, 130 Minn. 320, 153 N. W. 604.

A gift may be made without using express words to that effect if the intention of testator to make a gift can be clearly ascertained from the language of the document.—*Connor v. Gardner*, 230 Ill. 258, 15 L. R. A. (N. S.) 73, 82 N. E. 640.

to exercise his own judgment.²⁸ This question, however, is more properly dealt with under the subject of trusts.

§ 40. The Date and Attestation Clause Should Be Set Forth in Wills—Benefits Thereof.

The dating of a will and the insertion of a formal attestation clause are matters of statutory regulation. Generally speaking, a *holographic* will is one entirely written, dated and signed by the testator, no witnesses being required, but usually the dating of such an instrument by the maker is necessary to its validity. The date of the making of a will, however, may be of importance since wills must be executed according to the statutory requirements then existing; but if necessary the date may be proved by parol.²⁹ As to the attestation clause, even in those jurisdictions where it is not necessary that it be set forth in a will, the mere signing by the testator and witnesses being sufficient if followed by proof that the will was, in the presence of the required number of witnesses, duly signed by the maker, declared by him to be his last will and testament and that the witnesses, in his presence and in the presence of each other and at his request, subscribed their names as witnesses; yet if such facts are set forth in the attestation clause, it is presumed that they are true. The place of execution should be set forth. Wills of real property must be executed according to the requirements of the jurisdiction wherein the land is situated, while personal property follows the

²⁸ Williams v. Williams, 1 Sim. N. S. 358; Liddard v. Liddard, 6 Jur. N. S. 439; Bonser v. Kinnear, 6 Jur. N. S. 882; Bernard v. Min-

shall, John. (Eng.) 276, 5 Jur. (N. S.) 931.

²⁹ Wright v. Wright, 5 Ind. 389; Deakins v. Hollis, 7 Gill & J. (Md.) 311.

owner. The location, therefore, where the will was made, may be a factor of importance although it could be shown by parol evidence. But as witnesses may die or leave the country, the safest guide is to have the will show when and where it was executed and to insert an attestation clause which sets forth fully the facts showing due compliance with all the statutory requirements.

§ 41. Statutes Prescribing Formalities of Execution Must Be Considered.

Certain instruments, in the form of a deed and the like, may be signed and witnessed with all the formalities required for the execution of wills as well as of deeds or other instruments, and therefore may become operative in some character, no matter what their character may be determined to be. In those jurisdictions, however, where the statutes require publication of the will by the testator, that is, that he declare the instrument, at the time of execution and in the presence of the subscribing witnesses, to be his last will, a writing not so published will be denied probate.³⁰ In considering informal documents, therefore, it is necessary to refer to the statutory requirements regarding execution. As to letters, entries in diaries or books of account, and the like, they are seldom if ever witnessed; but if they are fully in the handwriting of the testator and dated and signed by him so as to satisfy the statute regarding the execution of *holographic* wills, they may be admitted to probate if determined to be testamentary in character.

³⁰ Rogers v. Diamond, 13 Ark. (Ky.) 114; Compton v. Mitton, 12 474; Swift v. Wiley, 1 B. Mon. N. J. L. 70.

§ 42. The Question of the Character of an Instrument May Be of Vital Importance.

The determination of the character of an instrument is often a matter of vital importance. It may be a question whether the writing is a deed or a will; if a deed it may be invalid because never delivered; if a will, some formality of execution may be lacking and therefore probate must be denied. Further deeds, assignments, promissory notes and the like, unless intended as a voluntary gift, must be supported by a valuable consideration. A valid consideration may be presumed from the writing; this is especially true where such consideration is expressed on the face of the instrument. Parol evidence has been held inadmissible to show a want of consideration; but it is difficult to see what effect could be given a writing which is ineffectual as a will, which was not intended as a gift, and which was executed without consideration.³¹

Then, again, a will as distinguished from other writings, is revocable at the pleasure of the maker; thus an alleged claim against an estate may be defeated because of some action previously taken by the deceased. A will, also, has no force or effect until the death of the testator, whereas a deed or an assignment, if not limited and duly delivered, passes a present interest in property. When the interest vested may be of vital importance; for instance, although a person can, during his life, give all his property to charity, yet in most jurisdictions the amount which can be so disposed of by will is limited by statute.

³¹ Woodbridge v. Spooner, 3 B. Admr., 6 Dana (Ky.) 257. See, also, & Ald. 233. Kirkpatrick v. Pyle, 6 Houst.

Compare: Jackson v. Jackson's (Del.) 569.

§ 43. The Determination of the Character of an Instrument Affects Substantial Rights.

In the administration of an estate, the first disbursements to be made are for the expenses of the last illness of the deceased, then come the fees and expenses of administration, after which claims against the estate may be paid. Some claims may be secured, as where the holder has a mortgage of real property or a pledge of personalty, the property so mortgaged or pledged being primarily held for the debt and may first be sold to settle the claim. Devisees and legatees can receive the benefit of the provisions in their favor only after the above mentioned expenses and claims have been settled. And as to such beneficiaries, the holders of specific devises and specific legacies are entitled to first receive the same, general and residuary beneficiaries coming after. Thus a writing in the form of a contract, if construed as such, might be so worded that it could be specifically enforced against the estate of the deceased;³² if held to be a will, a suit for specific performance would not lie.³³ A writing in the form of, and held to be, a promissory note, would make the payee an unsecured creditor of the estate; if held to be a will, he would be a legatee and if the estate was insolvent, he would receive nothing.

§ 44. Writings in the Form of Deeds, Notes, Letters, Assignments and the Like, Have Been Admitted to Probate.

In determining the legal character of an instrument, its form is not regarded and its construction is not influenced by the fact that the form of the document may be that of an indenture, deed-poll, bond, or agreement, under

³² McKinnon v. McKinnon, 56 Fed. 409, 5 C. C. A. 530.

³³ Hazleton v. Reed, 46 Kan. 73, 26 Am. St. Rep. 86, 26 Pac. 450.

seal or not under seal, recorded or not recorded, witnessed by one or by many; it is the intention of the maker and the meaning of the instrument which prevail. The true test of the legal character of the instrument is whether, regardless of form, it passes a present interest. If so, it is not a will; but if the interest conveyed is not to take effect until after the death of the maker, it is testamentary in character and, if executed according to the formalities prescribed by law, it will be admitted to probate. There is hardly any form of paper which has not been admitted to probate provided the maker intended it to operate only after his demise.³⁴ Thus we find that writings in the form of an entry in a diary³⁵ or in an account book,³⁶ instructions to a solicitor for preparing a codicil,³⁷ endorsements assigning notes or bonds,³⁸ an assignment of a life insurance policy,³⁹ marriage articles,⁴⁰ a bill of sale,⁴¹ powers of

³⁴ *Manly v. Lakin*, 1 Hagg. 130; *Ingram v. Wyatt*, 1 Hagg. 384; *Masterman v. Maberly*, 2 Hagg. 235; *Goods of Knight*, 2 Hagg. 554; *Shingler v. Pemberton*, 4 Hagg. 356; *Thorold v. Thorold*, 1 Phillim. 1; *Passmore v. Passmore*, 1 Phillim. 216; *Denny v. Barton & Rashleigh*, 2 Phillim. 575; *Peacock v. Monk*, 1 Ves. Sen. 127; *Ward v. Turner*, 2 Ves. Sen. 431; *Tomkyns v. Ladbroke*, 2 Ves. Sen. 591; *Habergham v. Vincent*, 2 Ves. Jun. 204; *Hester v. Young*, 2 Ga. 31; *Robinson v. Schly & Cooper*, 6 Ga. 515; *Johnson v. Yancey*, 20 Ga. 707, 65 Am. Dec. 646; *Turner v. Scott*, 51 Pa. St. 130; *Patterson v. English*, 71 Pa. St. 456; *Scott's*

Estate, 147 Pa. St. 89, 100, 30 Am. St. Rep. 713, 23 Atl. 212.

³⁵ *Reagan v. Stanley*, 11 Lea (Tenn.) 316.

³⁶ *Brown v. Eaton*, 91 N. C. 26; *Howarth v. Dewell*, 6 Jur. N. S. 1360.

³⁷ *Torre v. Castle*, 1 Curt. 303; s. c., 2 Moore P. C. C. 133.

³⁸ *Hunt v. Hunt*, 4 N. H. 434, 17 Am. Dec. 434; *Musgrave v. Down*, cit. 2 Hagg. Ecc. 247; *Jackson v. Jackson*, 6 Dana (Ky.) 257; Cf. *Plumstead's Appeal*, 4 Serg. & R. (Pa.) 545; *Masterman v. Maberly*, 2 Hagg. Ecc. 235.

³⁹ *Schad's Appeal*, 88 Pa. St. 111.

⁴⁰ *Marnell v. Walton*, cit. 2 Hagg. Ecc. 247.

⁴¹ *Kelleher v. Kernan*, 60 Md. 440.

attorney,⁴² checks upon banks,⁴³ orders upon savings banks,⁴⁴ promissory notes,⁴⁵ letters,⁴⁶ articles of agreement or contracts,⁴⁷ and deeds,⁴⁸ have been held testamentary in nature, and, having been duly executed and attested, entitled to probate.

§ 45. Features Which Distinguish a Will From Other Instruments.

The features which distinguish a will from other instruments are that it is ambulatory in character and revocable at pleasure, and does not become effective until after the death of the testator. An instrument which becomes operative during the life of the maker and passes any interest in property before his death, even though the enjoyment thereof be postponed until after the demise

⁴² Doe v. Cross, 8 Q. B. 714; In re Robinson, L. R. 1 P. & D. 384; Rose v. Quick, 30 Pa. St. 225.

⁴³ Jones v. Nicholay, 2 Eng. L. & Eq. 591; Walsh v. Gladstone, 1 Phillim. 294, overruling Gladstone v. Tempest, 2 Curt. 650; Bartholomew v. Henley, 3 Phillim. 317.

⁴⁴ In re Marsden, 1 Sw. & Tr. 542.

⁴⁵ Maxee v. Shute, cit. 2 Hagg. Ecc. 247; Caviness v. Rushton, 101 Ind. 500, 51 Am. Rep. 759.

⁴⁶ In re McCabe, 2 Sw. & Tr. 474; Passmore v. Passmore, 1 Phillim. 216; Denny v. Barton, 2 Phillim. 575; Manley v. Lakin, 1 Hagg. Ecc. 130; Cock v. Cooke, L. R. 1 P. & D. 241; Cowley v. Knapp, 42 N. J. L. 297; Byers v. Hoppe, 61 Md. 206, 48 Am. Rep. 89; Boyd v. Boyd, 6 Gill & J. (Md.) 25; Wagner v. McDonald, 2 Har. & J.

(Md.) 346; Rose v. Quick, 30 Pa. St. 225; Morrell v. Dickey, 1 Johns. Ch. (N. Y.) 153; Porter v. Turner, 3 Serg. & R. (Pa.) 108.

⁴⁷ Green v. Proude, 3 Keb. 310; s. c., 1 Mod. 117; Hixon v. Wytham, 1 Ch. Cas. 248; Jones v. Rhoads, 74 Ind. 510; Castor v. Jones, 86 Ind. 289.

⁴⁸ Thorold v. Thorold, 1 Phillim. 1; Goods of Knight, 2 Hagg. Ecc. 554; Shingler v. Pemberton, 4 Hagg. Ecc. 356; Cf. Atty.-Gen. v. Jones, 3 Price 368; Sperber v. Balsler, 66 Ga. 317; Gage v. Gage, 12 N. H. 371; Turner v. Scott, 51 Pa. St. 126; Goodale v. Evans, 263 Mo. 219, 172 S. W. 370; Ingram v. Porter, 4 McCord (S. C.) 198; Milledge v. Lamar, 4 Desaus. Eq. (S. C.) 617; Peacock v. Monk, 1 Ves. Sen. 127; Tomkyns v. Ladbroke, 2 Ves. Sen. 591.

of the donor and even though it may be contingent upon the survivorship of the donee, is a deed or contract and can not operate as a will. If, however, the instrument is not to become operative until after the death of the maker, then it is testamentary in character even though executed pursuant to some contract or obligation appearing on its face.⁴⁹

§ 46. The True Test of a Will Is Testamentary Intent to Pass Property After the Death of the Maker.

In cases where doubt arises as to whether the instrument is a will or of some other character, the true test is whether the maker executed the document with *animus testandi*. To be a will the maker must have intended to pass his property only after his death and to pass it by the particular instrument in question, although he may have designated it by a different name and through ignorance of the law may not, in fact, have known that he was making a will. The test of the character of the instrument is the intention of the maker at the time of its execution and a construction of the document must be based upon its provisions.⁵⁰ An instrument executed because of fraud or coercion lacks the element of *animus testandi*, and the same may be said of a writing in the form of a will which was executed merely as an idle

⁴⁹ Hester v. Young, 2 Ga. 31; Spencer v. Robbins, 106 Ind. 580, 5 N. E. 726; Matter of Diez, 50 N. Y. 88; Gilman v. McArdle, 99 N. Y. 451, 52 Am. Rep. 41, 2 N. E. 464; Phifer v. Mullis, 167 N. C. 405, 83 S. E. 582.

⁵⁰ Habergham v. Vincent, 2 Ves. Jun. 204; Bogan v. Swearingen,

199 Ill. 454, 65 N. E. 426; Christ v. Kuehne, 172 Mo. 118, 72 S. W. 537; Smith v. Baxter, 68 N. J. L. 414, 53 Atl. 1125; Phifer v. Mullis, 167 N. C. 405, 83 S. E. 582; Patterson v. English, 71 Pa. St. 454.

Compare: Swett v. Boardman, 1 Mass. 258, 2 Am. Dec. 16; Combs v. Jolly, 3 N. J. Eq. 625.

jest.⁵¹ But if a writing has been drawn up and executed with all the required formalities and shows on its face a complete scheme for the disposition of the maker's property after his death, with nothing appearing that would cause suspicion, it is a dangerous matter to allow parol evidence to overturn such a document.⁵²

§ 47. The Same Subject: Notes of a Will to Be Thereafter Drawn Sometimes Admitted to Probate.

The execution of a paper presumes that it was to take effect in some form, but it can not be a will unless it was written with *animus testandi*. Proof that a party intended to make a disposition of his property similar to or identical with that contained in a certain paper which he has executed, does not make such paper his will. No matter what his intentions may have been, if the maker of an instrument did not intend by that particular paper to dispose of his property in the manner in which it could have been disposed of only by will, such instrument must be denied probate, no matter how correct it may be as to form and execution and no matter how clearly it may conform to the intentions of the maker which he had otherwise expressed.⁵³ There is a modification of this rule, however, as, for instance, where a man has drawn up a draft or notes of the provisions which he desires to have incorporated in his will to be thereafter formally

⁵¹ Nichols v. Nichols, 2 Phillim. 180; Lister v. Smith, 3 Sw. & Tr. 282; Fleming v. Morrison, 187 Mass. 120, 105 Am. St. Rep. 386, 72 N. E. 499.

⁵² Brown v. Avery, 63 Fla. 355, Ann. Cas. 1914A 90, 58 So. 34; Sewell v. Slingluff, 57 Md. 537; Phifer v. Mullis, 167 N. C. 405, 83 S. E. 582.

⁵³ Masterman v. Maberly, 4 Eng. Ecc. 103; s. c., 2 Hagg. Ecc. 235; Sharp v. Sharp, 2 Leigh (Va.) 249; Waller v. Waller, 1 Gratt. (Va.) 454, 42 Am. Dec. 564; Pollock v. Glassell, 2 Gratt. (Va.) 439; Hocker v. Hocker, 4 Gratt. (Va.) 277.

executed, and which draft or notes have been fully written and signed by him so as to satisfy the requirements of the statute. In such a case, the draft or notes, if expressing the testamentary purposes of the maker, may be admitted to probate as his will. This, however, is permitted only in those cases when the testator has been prevented by an act of God from fully carrying out his purposes; and such draft or notes can be admitted as a will only when they express the final intention of the maker as to the manner in which he wishes his property to be disposed of at his death. And if the draft or notes are incomplete, as where they show that the testator intended to add other provisions, they do not show a final determination and must be refused probate.⁵⁴

§ 48. Courts Will Carry Out the Intention of the Maker If It Can Lawfully Be Done.

Where an instrument to be construed shows a clear intention on the part of the maker to dispose of his estate, but he has taken an ineffectual method of doing so, if the intention of the maker can become operative by construing the instrument as being of a different character from that apparently intended, matters of form will be disregarded and the substance of the document will be

⁵⁴ McBride v. McBride, 26 Gratt. (Va.) 476; *In re Barber's Will*, 92 Hun 489, 37 N. Y. Supp. 235. See, also, *Trustees of Western Maryland College v. McKinstry*, 75 Md. 188, 23 Atl. 471.

An instrument containing the provision "that this writing is instead of a formal will which I intend to make," but afterwards duly signed and witnessed, was admitted to probate.—*In re Beebe*,

6 Dem. Surr. 43. However, an instrument duly executed in the manner required of wills, but which contained a provision at the beginning stating, "This is not meant as a legal will, but as a guide," was denied probate, it being held that the testator did not intend the paper at the time of its execution to be a will.—*Ferguson-Davie v. Ferguson-Davie*, L. R. 15 Prob. Div. 109.

carried into execution if this can be lawfully done.⁵⁵ No instrument, however, can be construed either as a will, as a deed, or as of any other character, unless it was executed according to all required formalities.⁵⁶

A will may be informally drawn and may consist of one or more papers. No particular words are necessary to show a testamentary intent on the part of the maker, but it must appear that he intended to dispose of his property only after his death. To show the maker's intent, parol evidence of surrounding circumstances is admissible. The language of the instrument will be construed in the light of surrounding circumstances, and if it appears from such evidence that the maker intended the instrument to be testamentary, the court will give effect to such intention if it can do so consistently with the language of the instrument, no matter what its form may be.⁵⁷

§ 49. An Instrument May Be Construed as a Will Although Not So Intended by Its Maker.

While the intention of the maker of an instrument should prevail in determining its character, yet if he intends the writing to operate as a posthumous disposition of his property, in those jurisdictions where publication

⁵⁵ *Habergham v. Vincent*, 2 Ves. Jun. 204; *Phifer v. Mullis*, 167 N. C. 405, 83 S. E. 582.

⁵⁶ *McKinnon v. McKinnon*, 46 Fed. 713; *Comer v. Comer*, 120 Ill. 421, 11 N. E. 848; *Keeler v. Merchants' Trust Co.*, 253 Ill. 528, 97 N. E. 1061; *Cover v. Stem*, 67 Md. 449, 1 Am. St. Rep. 406, 10 Atl. 231; *Russell v. Webster*, 213 Mass. 491, 100 N. E. 637; *Griffin v. McIntosh*, 176 Mo. 392, 75 S. W. 677; *Allison's Excs. v. Allison*, 4 Hawks

(N. C.) 141; *Goodale v. Evans*, 263 Mo. 219, 172 S. W. 370.

⁵⁷ *Jones v. Nicolay*, 2 Rob. Ecc. 288; *Estate of Wood*, 36 Cal. 75; *Clarke v. Ransom*, 50 Cal. 595; *Estate of Skerrett*, 67 Cal. 585, 8 Pac. 181; *Succession of Ehrenberg*, 21 La. Ann. 280, 99 Am. Dec. 729; *McGrath v. Reynolds*, 116 Mass. 566; *Outlaw v. Hurdle*, 1 Jones L. (N. C.) 151; *Todd's Will*, 2 Watts & S. (Pa.) 145.

is not required by statute, the document may be declared a will, even though the maker did not know that he was performing a testamentary act and even though he did not intend to perform such an act. He may, through ignorance of the law, expressly declare the paper to be of a different nature.⁵⁸ Such is often the case where one attempts to dispose of property by deed in which a life interest is reserved and where subsequently he, repenting of his generosity, seeks by another writing to make a different disposition of the same. The question then arises as to whether or not the first instrument may be revoked. If it was a present disposition of property, there could be no revocation; if it was testamentary in character, there could be. The general rule is that, whatever its form, if the instrument contains a disposition of property to take effect after the maker's death, vesting no present title but merely appointing what is to be done after death, it is testamentary in nature, ambulatory and revocable, even though it was intended that its character should be other than that of a will. If it confers an immediate title to property, even though the possession thereof be postponed during the life of the grantor, it partakes of the nature of a deed and may not be revoked by any subsequent act. It is, of course, absolutely necessary, in holding a document to be a will, that the maker should have intended to pass some estate or interest in property after his death and further, should have intended to pass it by the instrument in question. He must have had the *animus testandi*. Although the purpose of the maker of an instrument may have been to execute a document of a different character, yet if what he did by the instru-

⁵⁸ *Hazleton v. Reed*, 46 Kan. 73, 26 Am. St. Rep. 86, 26 Pac. 450; *Turner v. Scott*, 51 Pa. St. 126.

ment executed was to do that which could only be effected by a will, the instrument is testamentary in character and, if properly executed, will be admitted to probate.⁵⁹

§ 50. The Language of an Instrument as Showing the Intent of the Maker.

In effectuating the intention of the maker of an instrument, the general rule is that if the language of the entire document shows an intention to provide for a general scheme for the disposing of property and such scheme is

- ⁵⁹ *Green v. Proude*, 1 Mod. 117; *Ward v. Turner*, 2 Ves. Sen. 440; *Habergham v. Vincent*, 2 Ves. Jun. 204; *Goods of Slinn*, L. R. 15 Prob. Div. 156; *Gillham Sisters v. Mustin*, 42 Ala. 365; *Kelly v. Richardson*, 100 Ala. 584, 13 So. 785; *Clarke v. Ransom*, 50 Cal. 595; *Jackson v. Culpepper*, 3 Ga. 569; *Symmes v. Arnold*, 10 Ga. 506; *Jones v. Morgan*, 13 Ga. 515; *Hall v. Bragg*, 28 Ga. 330; *Moye v. Kittrell*, 29 Ga. 677; *Sperber v. Balster*, 66 Ga. 317; *Goff v. Davenport*, 96 Ga. 423, 23 S. E. 395; *Comer v. Comer*, 120 Ill. 420, 11 N. E. 848; *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683; *Bowler v. Bowler*, 176 Ill. 541, 52 N. E. 437; *Stroup v. Stroup*, 140 Ind. 179, 27 L. R. A. 523, 39 N. E. 864; *Burlington University v. Barrett*, 22 Ia. 60, 92 Am. Dec. 376; *Hazleton v. Reed*, 46 Kan. 73, 26 Am. St. Rep. 86, 26 Pac. 450; *Lacy v. Comstock*, 55 Kan. 86, 39 Pac. 1024; *Maxwell v. Maxwell*, 3 Metc. (Ky.) 101; *Boyd v. Boyd*, 6 Gill & J. (Md.) 25; *Baltimore v. Williams*, 6 Md. 235; *Carey v. Dennis*, 13 Md. 1; *Kelleher v. Kernan*, 60 Md. 440; *McGrath v. Reynolds*, 116 Mass. 566; *Bromley v. Mitchell*, 155 Mass. 509, 30 N. E. 83; *Estate of Lautenschlager*, 80 Mich. 285, 45 N. W. 147; *Herrington v. Bradford*, 1 Miss. 520; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147; *Edwards v. Smith*, 35 Miss. 197; *Robnett v. Ashlock*, 49 Mo. 172; *Outlaw v. Hurdle*, 1 Jones L. (N. C.) 151; *Phifer v. Mullis*, 167 N. C. 405, 83 S. E. 582; *Gage v. Gage*, 12 N. H. 371; *Turner v. Scott*, 51 Pa. St. 126; *Frederick's Appeal*, 52 Pa. St. 338, 91 Am. Dec. 159; *Patterson v. English*, 71 Pa. St. 458; *Frew v. Clarke*, 80 Pa. St. 170; *Singleton v. Bremar*, 4 McCord (S. C.) 12, 17 Am. Dec. 699; *Alexander v. Burnet*, 5 Rich. (S. C.) 189; *Wheeler v. Durant*, 3 Rich. Eq. (S. C.) 452; *Babb v. Harrison*, 9 Rich. Eq. (S. C.) 111, 70 Am. Dec. 203; *Millican v. Millican*, 24 Tex. 426; *Hocker v. Hocker*, 4 Gratt. (Va.) 277; *McBride v. McBride*, 26 Gratt. (Va.) 476.

not contrary to law, it is the duty of the court to determine the instrument to be of such a character as will carry out the intention of the maker.⁶⁰ Although the form of the instrument is not conclusive of the intention of the maker, yet if the writing is in the form of and was executed and designated as a deed, such facts are to be considered in determining the intention of the maker.⁶¹ The language of the instrument, however, prevails and the intention of the maker is to be gathered from the four corners of the document. He is presumed to have used language which expressed his intention, and the instrument should be construed according to the legal meaning of its words. Thus if a party uses language which imports a testamentary intent, such fact has a bearing on the construction to be given to the instrument.⁶² Words, however, should not be taken in such a narrow or grammatical sense as to be unreasonable. Grammatical construction will not be allowed to defeat the intention of the maker as drawn from the entire will. Where the words used, applied to the facts of the case, create an ambiguity, the words may be modified or extended in order to remove the ambiguity and to give effect to the maker's intention, but for no other purpose.⁶³

⁶⁰ *Roe v. Vingut*, 117 N. Y. 204, 22 N. E. 933.

⁶¹ *Thompson v. Johnson*, 19 Ala. 59; *Rawlings v. McRoberts*, 95 Ky. 346, 25 S. W. 601.

⁶² *Hazleton v. Reed*, 46 Kan. 73, 26 Am. St. Rep. 86, 26 Pac. 450; *Turner v. Scott*, 51 Pa. St. 126.

⁶³ *Metcalf v. Framington Parish*, 128 Mass. 370; *Stewart v. Stewart*, 177 Mass. 493, 59 N. E. 116; *Johnson v. Johnson*, 128 Ind. 93, 27 N. E. 340; *McMurtrie v. Mc*

murtrie, 15 N. J. L. 276; *Pond v. Berg*, 10 Paige (N. Y.) 140; *Carter v. Bloodgood*, 3 Sandf. Ch. (N. Y.) 293; *Tayloe v. Johnson*, 63 N. C. 381; *Slingluff v. Johns*, 87 Md. 273, 39 Atl. 872; *Horwitz v. Norris*, 60 Pa. St. 261.

Technical terms may be used in a will, but they are unnecessary. Ordinary words are construed according to their grammatical sense; technical terms according to their legal sense, unless the

§ 51. In Determining the Legal Character of an Instrument, the Court Will Be Guided by Its Provisions, Together With Surrounding Circumstances.

The determination of the legal character of an instrument, that is, whether it is testamentary or not, depends mainly upon the question whether the maker intended to convey an estate or interest to vest before his death and upon the execution of the paper, or whether the estate or interest was to pass only after his demise. In construing such an instrument the court will not allow the language of the document or even the belief of the maker as to its character to absolutely control its decision. The court will weigh all the language and be governed mainly by the provisions of the instrument; but all the facts and circumstances surrounding the parties and attending the execution of the document will be used as an aid so as to impress on the instrument such a character as will make effective the intention of the maker. The document may have been designated by any other name; it may have been called a deed, a bond, a marriage settlement, a letter, a promissory note or the like, yet if the facts above mentioned show, on the whole, that the maker intended that it should pass an estate or an interest only after his death, it will be held to be a will.⁶⁴ To be

language of the instrument shows that they were employed otherwise. See *Taylor v. Stephens*, 165 Ind. 200, 74 N. E. 980; *White v. Massachusetts Inst.*, 171 Mass. 84, 50 N. E. 512. Correct rules of grammar require punctuation and capital letters; but grammatical errors are disregarded, the language of the instrument being controlling. See *Black v. Herring*,

79 Md. 146, 28 Atl. 1063; *Eberhardt v. Perolin*, 49 N. J. Eq. 570, 25 Atl. 510; *Will of Turner*, 208 N. Y. 261, *Ann. Cas.* 1914D, 245, 101 N. E. 905.

⁶⁴ *Habergham v. Vincent*, 2 Ves. Jun. 204; *Dunn v. Bank of Mobile*, 2 Ala. 152; *Shepherd v. Nabors*, 6 Ala. 631; *Thompson v. Johnson*, 19 Ala. 59; *Gillham Sisters v. Mustin*, 42 Ala. 365; *Sharp v. Hall*, 86 Ala.

admitted to probate, of course, the will must have been executed according to all the required formalities.

§ 52. Evidence of Surrounding Circumstances Limited to the Purpose of Ascertaining Intent.

The language of an instrument may be ambiguous or silent as to whether or not the maker intended it as a will and therefore collateral evidence may be admitted to show the intent of the maker at the time of the execution of the paper. Such evidence can not be admitted for the purpose of changing the provisions of the instrument, but is limited solely to the question of intent. Thus evidence of the circumstances surrounding the execution of the document and parol declarations by the maker either at the time of the execution of the paper or subsequently thereto, may be received for such purpose, and so aid in determining the character of the instrument. If a paper had been executed but never delivered, evidence that the maker retained custody of it and kept the same in some safe place and frequently

110, 113, 11 *Am. St. Rep.* 23, 5 *So.* 497; *Crocker v. Smith*, 94 *Ala.* 295, 299, 16 *L. R. A.* 576, 10 *So.* 258; *Abney v. Moore*, 106 *Ala.* 134, 18 *So.* 60; *Whitten v. McFall*, 122 *Ala.* 619, 623, 26 *So.* 131; *Burlington University v. Barrett*, 22 *Ia.* 60, 92 *Am. Dec.* 376; *Spencer v. Robbins*, 106 *Ind.* 580, 5 *N. E.* 726; *Wall v. Wall*, 30 *Miss.* 91, 64 *Am. Dec.* 147; *Matter of Diez*, 50 *N. Y.* 88; *Gilman v. McArdle*, 99 *N. Y.* 451, 52 *Am. Rep.* 41, 2 *N. E.* 464.

As to the construction of joint wills being controlled by their contents, see, post, §§ 78, 79.

As to the evidence necessary to establish agreements to execute mutual or reciprocal wills, see, post, §§ 92, 93.

As to the admissibility of extrinsic evidence to show whether or not the maker of a will intended it to be conditional, see, post, §§ 110, 111, 112.

As to the extent to which parol declarations of a testator may be admitted to prove or disprove revocation, see, post, §§ 124, 125, 126.

As to the evidence necessary to prove a contract to make a will, see, post, §§ 136, 138, 139.

referred to it as his will, is competent as tending to prove that the instrument had been executed with testamentary intent.⁶⁵ Such evidence, however, is not only limited to the single purpose of determining the intent of the maker of an instrument, but is admissible only where doubt as to its character appears on the face of the paper. A deed absolute in form and executed with the intention that the same should be delivered during the life of the maker but which in fact was never delivered, can not be trans-

⁶⁵ *Seay v. Huggins*, (Ala.) 70 So. 113; *Sperber v. Balster*, 66 Ga. 317; *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683; *Stewart v. Stewart*, 177 Mass. 493, 59 N. E. 116; *Scott's Appeal*, 147 Pa. St. 89, 30 Am. St. Rep. 713, 23 Atl. 212; *Tozer v. Jackson*, 164 Pa. St. 373, 384, 30 Atl. 400; *Kisecker's Estate*, 190 Pa. St. 476, 42 Atl. 886; *Smith v. Smith*, 112 Va. 205, 33 L. R. A. (N. S.) 1018, 70 S. E. 491.

On a trial in ejectment, the plaintiff produced a deed made between a father and son wherein the father agreed to give the son so much and the son agreed to pay certain sums and debts. The document also contained certain expressions usually found in wills, but the writing was both sealed and delivered as a deed. Evidence was admitted to show that the father intended it as his last will.—*Green v. Proude*, 1 Mod. 117.

To determine whether an instrument was a will or deed, proof regarding testator's purpose and efforts to provide for his beneficiary in anticipation of a trip was

held properly received in evidence for the purpose of determining whether the condition of mind existed at the time of the execution of the instrument, which the law regards as testamentary.—*Kelleher v. Kernan*, 60 Md. 440.

Calling a paper which he has signed his will and requesting another to witness it has been held to imply *animus testandi*.—In re *Mitnacht's Will*, 146 N. Y. Supp. 171.

The instrument in the following case was construed as a deed. It had been delivered, but the grantor remained in the possession of the property until his death. It was held that his subsequent acts did not make the paper testamentary.—*Driscoll v. Driscoll*, 143 Cal. 528, 77 Pac. 471.

A document in the form of a deed, but held to be a will and invalid because of improper execution, can not be made valid by the grantee's acceptance of the same and performing its conditions.—*Ransom v. Pottawattamie County*, 168 Ia. 570, 150 N. W. 657.

As to the construction of joint

formed into a testamentary document.⁶⁶ On the other hand, a paper in the form of a will and executed as such, the provisions of which declare that the property mentioned is to pass after the death of the maker, can not be converted into a deed.⁶⁷

§ 53. Parol Declarations May Be Received as Part of the Res Gestæ.

The declarations of a party to an instrument, whether made before or after its execution, are generally inadmissible in evidence either to destroy the instrument or con-

wills being controlled by their contents, see, post, §§ 78, 79.

As to the evidence necessary to establish agreements to execute mutual or reciprocal wills, see, post, §§ 92, 93.

As to the admissibility of extrinsic evidence to show whether or not the maker of a will intended it to be conditional, see, post, §§ 110, 111, 112.

As to the extent to which parol declarations of a testator may be admitted to prove or disprove revocation, see, post, §§ 124, 125, 126.

As to the evidence necessary to prove a contract to make a will, see, post, §§ 136, 138, 139.

⁶⁶ *Goods of Davy*, 1 Sw. & Tr. 262; *Elliott v. Cheney*, 183 Mich. 561, 150 N. W. 163; *Stilwell v. Hubbard*, 20 Wend. (N. Y.) 44.

⁶⁷ *Goods of English*, 3 Sw. & Tr. 586; *Whyte v. Pollok*, 7 App. Cas. 400; *Sewell v. Slingluff*, 57 Md. 537.

If a party makes an absolute conveyance by deed divesting him-

self of all his property to one heir in exclusion of others, a disposition which would be a fraud against the law of wills of the state where such deed was made, if such conveyance was a deed it can not be avoided on the claim that it was a testamentary disposition of property and void as against the statute. But if such instrument was not to operate as a present transfer of property and was to take effect only after the death of the maker, it would be a will, no matter what its form, and would be subject to the statutes regarding testamentary disposition.—*Crain v. Crain*, 17 Tex. 80; *Millican v. Millican*, 24 Tex. 426.

As to the construction of joint wills being controlled by their contents, see, post, §§ 78, 79.

As to the evidence necessary to establish agreements to execute mutual or reciprocal wills, see, post, §§ 92, 93.

As to the admissibility of extrinsic evidence to show whether or

trol its construction.⁶⁸ But where a document is offered for probate and an ambiguity exists so that the intention of the maker should be ascertained, his statements made at or very near the time the instrument was executed may be taken as part of the *res gestæ* and is proper evidence to show the intention of the maker at the time he signed the paper.⁶⁹ But evidence of parol declarations made either before or after the execution, is not admissible for the purpose of invalidating a will. Evidence of subsequent declarations might be admissible to show that the maker knew and understood the contents of the instrument, as in a case where it was claimed that he had been deceived, or where it was for the purpose of showing

not the maker of a will intended it to be conditional, see, post, §§ 110, 111, 112.

As to the extent to which parol declarations of a testator may be admitted to prove or disprove revocation, see, post, §§ 124, 125, 126.

As to the evidence necessary to prove a contract to make a will, see, post, §§ 136, 138, 139.

⁶⁸ *Green v. Proude*, 1 Mod. 117; *Garlick v. Bowers*, 66 Cal. 122, 4 Pac. 1138; *Mowry v. Heney*, 86 Cal. 471, 25 Pac. 17; *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683; *Mooney v. Olsen*, 22 Kan. 69; *Caemen v. Van Harke*, 33 Kan. 333; *Kitchell v. Beach*, 35 N. J. Eq. 446; *Linton's Appeal*, 104 Pa. St. 228.

⁶⁹ *Badgley v. Votrain*, 68 Ill. 25, 18 Am. Rep. 541; *Comer v. Comer*, 120 Ill. 420, 11 N. E. 848; *Roth v. Michalis*, 125 Ill. 325, 17 N. E. 809; *Frew v. Clarke*, 80 Pa. St. 170;

Low v. Low, (Tex. Civ.) 172 S. W. 590.

A written instrument purporting to convey certain real estate, also provided "that it should have full force and effect at his death." The court said no particular form of words is necessary to make a will and the test of its character is the intention of the maker read in the light of surrounding circumstances.—*Sperber v. Balster*, 66 Ga. 317.

Parol evidence is not admissible to explain the character of the instrument unless the uncertainty appears from the language of the instrument itself.—*Phifer v. Mullis*, 167 N. C. 405, 83 S. E. 582.

If the instrument is clearly a deed, it must be so declared and evidence can not be introduced to show it to be testamentary in character.—*Elliott v. Cheney*, 183 Mich. 561, 150 N. W. 163.

the understanding and intention of the maker regarding what he had already done, but such evidence is limited to such purposes.⁷⁰

§ 54. Extrinsic Evidence as Affecting the Question of Revocation.

Evidence of the circumstances under which a paper was executed, and subsequent transactions as well, may be admissible and pertinent in a case where the question of revocation is involved. A will may be revoked while a deed can not except where the grantee consents. An instrument in the form of a deed may be executed in part performance of an agreement for the disposition of the estate of the grantor, but if subsequent transactions between the parties or a new agreement inconsistent with the former arrangement can be shown, such evidence will be considered; and if it appears that it was the intention to revoke the former agreement, which could be shown by a later disposition inconsistent with the former, the instrument, even if characterized as a will, would be denied probate.⁷¹

⁷⁰ Robinson v. Brewster, 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683; Gage v. Gage, 12 N. H. 371.

Where the intent drawn from outside conversations shows that the grantor in an instrument did not wish the grantee to have the property covered by the instrument until after his death, but the document, in the regular form of a deed, contained nothing to show that a present interest was not to vest immediately and such document was not delivered, it will be ineffectual for any purpose.—Still-

well v. Hubbard, 20 Wend. (N. Y.) 44.

⁷¹ Gage v. Gage, 12 N. H. 371.

As to the construction of joint wills being controlled by their contents, see, post, §§ 78, 79.

As to the evidence necessary to establish agreements to execute mutual or reciprocal wills, see, post, §§ 92, 93.

As to the admissibility of extrinsic evidence to show whether or not the maker of a will intended it to be conditional, see, post, §§ 110, 111, 112.

§ 55. Distinction Between a Will and a Declaration of Trust.

The primary distinction between a will and a declaration of trust is that the former takes effect in the future upon the death of the testator, while the latter takes effect during the life of the settlor. If the maker of an instrument intended it as a testamentary disposition of property to take effect upon his death and adopted the form of a declaration of trust for the purpose of evading the statute of wills or the statute relating to the amount of his estate which he could devise for charitable purposes, yet if the instrument was not executed according to the formalities required for the execution of wills it would be void as a will. But if such instrument was intended as a present disposition of property it would be held valid as such.⁷²

§ 56. The Distinction Between a Will and a Deed.

The difference between a deed and a will is that a deed passes a present interest in property, although the right of possession and enjoyment may not vest until some future date or even until after the death of the grantor; while a will passes no interest in property until after the death of the testator.⁷³ The provisions of the document

As to the extent to which parol declarations of a testator may be admitted to prove or disprove revocation, see, post, §§ 124, 125, 126.

As to the evidence necessary to prove a contract to make a will, see, post, §§ 136, 138, 139.

⁷² Van Cott v. Prentice, 104 N. Y. 45, 10 N. E. 257; Amherst College v. Ritch, 151 N. Y. 282, 37 L. R. A. 305, 45 N. E. 876.

⁷³ McGuire v. Bank of Mobile,

42 Ala. 591; Hall v. Burkham, 59 Ala. 349; Bunch v. Nicks, 50 Ark. 367, 7 S. W. 563; Mowry v. Heney, 86 Cal. 475, 25 Pac. 17; Kopp v. Gunther, 95 Cal. 64, 30 Pac. 301; Tennant v. John Tennant Memorial Home, 167 Cal. 570, 140 Pac. 242; Owen v. Smith, 91 Ga. 564, 568, 18 S. E. 527; Spencer v. Robins, 106 Ind. 580, 5 N. E. 726; Craven v. Winter, 38 Ia. 478; Ransom v. Pottawattamie County, 168

mainly govern as to the character of an instrument. A deed, as distinguished from a will, must take effect upon its execution and delivery, or not at all. A deed not delivered is invalid. It is, of course, not necessary that a deed convey an immediate interest in possession, but the interest conveyed, whether present or future, must vest at the time the deed is executed and delivered, although the right of possession or enjoyment may be postponed until some future time. As to a will, no delivery is necessary and it does not become operative until after the death of the testator.⁷⁴ If a document which had never been deliv-

Ia. 570, 150 N. W. 657; *Bromley v. Mitchell*, 155 Mass. 509, 30 N. E. 83; *Myers v. Viverett*, 110 Miss. 334, 70 So. 449; *Diefendorf v. Diefendorf*, 132 N. Y. 100, 30 N. E. 375; *Phifer v. Mullis*, 167 N. C. 405, 83 S. E. 582; *Book v. Book*, 104 Pa. St. 240; *Trumbauer v. Rust*, 36 S. D. 301, 154 N. W. 801; *Chrisman v. Wyatt*, 7 Tex. Civ. App. 40, 26 S. W. 759; *Jenkins v. Adcock*, 5 Tex. Civ. App. 466, 27 S. W. 21; *Pirie v. Le Saulnier*, 161 Wis. 503, 154 N. W. 993.

⁷⁴ *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147.

The principle above mentioned is not in conflict with the rule which permits a person to settle property by deed to his own use during his life and after his decease to the benefit of other persons, although such disposition must postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, for the postponement in such case is by the express terms

of the instrument and does not result from the nature of the instrument.—*Gillham v. Mustin*, 42 Ala. 365.

In *Estate of Skerrett*, 67 Cal. 585, 8 Pac. 181, a copy of a deed and a letter were admitted to probate as an holographic will, the letter showing the animus testandi and the copy of the deed furnishing the date.

A deed, although duly executed, does not take effect until delivery. Delivery may be actual or constructive; the instrument may be actually handed to the grantee or to another for him; or delivery may be inferred from various circumstances, although the custody remained in the grantor. Such an inference, however, is only presumptive and may be overthrown by proof to the contrary. Where an instrument has been executed and delivered, the mere fact that the possession of the same has been retained by the maker does not prevent it from taking effect.

ered, is construed to be a deed, it is of no force or effect. In the absence of proper evidence showing that it was intended as a testamentary disposition, it must be refused probate and is therefore invalid for any purpose.

§ 57. The Same Subject: If the Instrument Becomes Operative Before the Maker's Death, It is Not a Will.

It is sometimes difficult to determine whether an instrument is a deed or a will. The mere reservation of a life interest does not make an instrument testamentary. The distinguishing feature is as to when the interest in the property vests. If the document directs or confers any benefit during the life of the maker it is not a will. The instrument itself must expressly or impliedly postpone the vesting of all interest until after the testator's demise.⁷⁵ Even though an instrument may have been made in contemplation of death, it does not become testamentary unless it becomes operative only after the maker's death. Thus where a husband made a deed in

—Hall v. Palmer, 3 Hare 532; Fletcher v. Fletcher, 4 Hare 67; Doe d. Garnons v. Knight, 5 Barn. & Cr. 671; Exton v. Scott, 6 Sim. 31; Tharp v. Jarrell, 66 Ind. 52; Pollock v. Glassell, 2 Gratt. (Va.) 439.

An instrument which was a deed when made is always a deed and can not be converted into a will. Nor does the recording of an instrument give it the character of a deed, for recording is only notice of the contents of the document and does not affect its character. Such fact may be evidence that the maker intended the instrument as a deed, but his belief that it

was so is not controlling. Nor, in determining the character of such an instrument, does the fact that it contains all the formal requisites of a deed and is couched in all the technical phraseology of such an instrument, positively determine its character.—Hester v. Young, 2 Ga. 31.

⁷⁵ Fletcher v. Fletcher, 4 Hare 67; Phillips v. Phillips, 186 Ala. 545, Ann. Cas. 1916D, 994, 65 So. 49; Gillham v. Mustin, 42 Ala. 365; Tennant v. John Tennant Memorial Home, 167 Cal. 570, 140 Pac. 242; Smith v. Corey, 125 Minn. 190, 145 N. W. 1067.

favor of his wife and delivered it to a third person with instructions to keep the same until after his death, for the benefit of his wife, and then to record it, the delivery was complete, the grantee being presumed to have accepted the same for the reason that she was benefited thereby. It was held that the instrument had the effect of conveying a present interest in the property.⁷⁶

§ 58. The Same Subject: The Provisions of an Instrument as Showing Its Character.

The dispositions of property made by the maker of an instrument may show its character, irrespective of the form of the paper. If no interest is to pass until after the death of the maker it is testamentary in character. Thus an instrument in the form of a deed which provided "that the grantee is to take no interest during the lives of the grantors" was held to be testamentary and therefore revocable even though it was claimed that a valid consideration had been paid.⁷⁷ On the other hand, an instrument in the form of a deed may contain a clause whereby the grantor reserves the power of revoking or modifying certain portions of the document, yet if there has been no revocation, such a provision would not destroy the character of the instrument as a deed.⁷⁸

⁷⁶ *Diefendorf v. Diefendorf*, 56 Hun 639, 8 N. Y. Supp. 617.

⁷⁷ *Hazleton v. Reed*, 46 Kan. 73, 26 Am. St. Rep. 86, 26 Pac. 450; *Leaver v. Gauss*, 62 Ia. 314, 17 N. W. 522.

⁷⁸ *Tompson v. Browne*, 3 Mylne & K. 32; *Jones v. Clifton*, 101 U. S. 225, 25 L. Ed. 908; *Hall v. Burkham*, 59 Ala. 349; *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659;

Spencer v. Robbins, 106 Ind. 580, 5 N. E. 726; *Von Hesse v. MacKaye*, 136 N. Y. 114, 32 N. E. 615.

In the following cases, instruments in the form of a deed and containing the provisions herein mentioned, were held to be deeds and not wills:

"The title to the above-described tract of land to still remain in said grantor for and during his life-

§ 59. The Same Subject: Various Provisions Construed.

Very close questions may therefore arise. A party may make an instrument in the form of a deed, yet in the

time, and at his death to vest in said" grantee.—*White v. Hopkins*, 80 Ga. 154, 4 S. E. 863.

"This deed not to take effect until after my decease; not to be recorded until after my decease."—*Shackelton v. Sebre*, 86 Ill. 616.

"Convey and warrant to" the grantee, naming him, "after my decease and not before, the following real estate," etc. It was held that the words "after my decease" did not make the instrument testamentary in character, but operated merely to show that the grantee's use and enjoyment of the lands would not begin until after the grantor's death.—*Owen v. Williams*, 114 Ind. 179, 15 N. E. 678.

"This deed not to take effect" until the grantor's death, "he to have and keep possession of said farm during his life."—*Phillips v. Thomas Lumber Co.*, 94 Ky. 445, 42 Am. St. Rep. 367, 22 S. W. 652.

"This deed or conveyance not to take effect during my life-time, and to take effect and be in force from and after my decease."—*Wyman v. Brown*, 50 Me. 139.

"This deed is not to take effect and operate as a conveyance until after my decease."—*Abbott v. Holway*, 72 Me. 298.

"At my death to have and hold."—*Chancellor v. Windham*, 1 Rich. (S. C.) 161, 42 Am. Dec. 411.

"This deed is made with the

understanding that (the grantors) shall have all controlling power of the above described premises during their life-time, and at their death then the title is to pass."—*Wimpey v. Ledford*, (Mo.) 177 S. W. 302.

"This deed not to take effect until after my death."—*Phillips v. Phillips*, 186 Ala. 545, Ann. Cas. 1916D, 994, 65 So. 49.

In the following cases the instrument was held to be a deed or a contract: *Jeffries v. Alexander*, 8 H. L. Cas. 594; *Alexander v. Brame*, 35 Eng. Law & Eq. 336; *Bowdoin College v. Merritt*, 75 Fed. 480; *Bunch v. Nicks*, 50 Ark. 367, 7 S. W. 563; *Bristol v. Warner*, 19 Conn. 7; *Jackson v. Culpepper*, 3 Ga. 569; *Cumming v. Cumming*, 3 Ga. 460; *McGlaw*, 17 Ga. 234; *Johnson v. Hines*, 31 Ga. 720; *White v. Hopkins*, 80 Ga. 154, 4 S. E. 863; *Seals v. Pierce*, 83 Ga. 787, 20 Am. St. Rep. 344, 10 S. E. 589; *Guthrie v. Guthrie*, 105 Ga. 86, 31 S. E. 40; *Gay v. Gay*, 108 Ga. 739, 32 S. E. 846; *Wynn v. Wynn*, 112 Ga. 214, 37 S. E. 378; *Cates v. Cates*, 135 Ind. 272, 34 N. E. 957; *Wilson v. Carrico*, 140 Ind. 533, 49 Am. St. Rep. 213, 40 N. E. 50; *Nowakowski v. Sobeziak*, 270 Ill. 622, 110 N. E. 809; *Rawlings v. McRoberts*, 95 Ky. 346, 25 S. W. 601; *Mayor etc. of Baltimore v. Williams*, 6 Md.

latter portion thereof he may reserve to himself the use of the property during his life, it thereafter to go to the grantees named without condition or limitation. The declaration in the instrument that the property was to pass to the grantees after the death of the maker would show an intention not to convey a present interest and the document would be construed as testamentary.⁷⁹ If,

235; *Myers v. Viverett*, 110 Miss. 334, 70 So. 449; *Wall v. Wall*, 30 Miss. 91, 64 *Am. Dec.* 147; *Reed v. Brown*, 184 Mich. 515, 151 N. W. 592; *Bromley v. Mitchell*, 155 Mass. 509, 30 N. E. 83; *Diefendorf v. Diefendorf*, 132 N. Y. 100, 30 N. E. 375; *Shields v. Irwin*, 3 Yeates (Pa.) 389; *Johnson v. McCue*, 34 Pa. St. 180; *Trumbauer v. Rust*, 36 S. D. 301, 154 N. W. 801; *Jaggers v. Estes*, 2 Strob. Eq. (S. C.) 343, 49 *Am. Dec.* 674; *Williams v. Sullivan*, 10 Rich. Eq. (S. C.) 217, 219.

In the following cases the instrument was held testamentary in character: *Metham v. Duke of Devon*, 1 Peere Wms. 529; *Green v. Proude*, 1 Mod. 117; *Haberg-ham v. Vincent*, 2 Ves. Jun. 204; *Seay v. Huggins*, (Ala.) 70 So. 113; *Hester v. Young*, 2 Ga. 31; *Symmes v. Arnold*, 10 Ga. 506; *Johnson v. Yancey*, 20 Ga. 707, 65 *Am. Dec.* 646; *Blackstock v. Mitchell*, 67 Ga. 768; *Johnson v. Sirmans*, 69 Ga. 617; *Ward v. Campbell*, 73 Ga. 97; *Stevenson v. Huddleson*, 13 B. Mon. (52 Ky.) 299; *Kelleher v. Kernan*, 60 Md. 440; *Terry v. Glover*, 235 Mo. 545, 139 S. W. 337; *Hunt v. Hunt*, 4 N. H. 434, 17 *Am. Dec.* 434; *Welch v. Kinard*, 1 Speer's

Eq. (S. C.) 256; *Crawford v. McElvy*, 2 Speer's Eq. (S. C.) 225, 230; *Watkins v. Dean*, 10 Yerg. (18 Tenn.) 321, 31 *Am. Dec.* 583; *Pollock v. Glassell*, 2 Gratt. (Va.) 439.

⁷⁹ An instrument in the form of a deed which conveyed real property to a son, excepting and reserving, nevertheless, the entire use and possession of the premises unto the grantor and his assigns for the term of his natural life, and which declared that the conveyance was in no way to take effect until after the decease of the grantor, the habendum clause being that the grantee was to hold the premises after the decease of the grantor, was held a will.—*Turner v. Scott*, 51 Pa. St. 126; *Leaver v. Gauss*, 62 Ia. 314, 17 N. W. 522.

A written instrument in the form of a deed, if in substance a will, may be given in evidence as a will.—*Green v. Proude*, 1 Mod. 117.

A disposition of property to take effect after the death of the grantor, is testamentary and therefore revocable.—*Frederick's Appeal*, 52 Pa. St. 338, 91 *Am. Dec.* 159. To the same effect: *Good-*

however, the grantor should reserve a life estate to himself but, by the instrument, create an estate in remainder to certain grantees, an interest in the property would vest in such grantees at the time of the execution and delivery of the document. A present interest vesting, the instrument could not be held testamentary.⁸⁰ The

ale v. Evans, 263 Mo. 219, 172 S. W. 370; *Rice v. Carey*, 170 Cal. 748, 151 Pac. 135; *Terry v. Glover*, 235 Mo. 545, 139 S. W. 337; *Murphy v. Gabbert*, 166 Mo. 596, 89 Am. St. Rep. 733, 66 S. W. 536.

⁸⁰ A deed reserving a life estate to the maker and creating an estate in remainder can not operate as a will.—*Doe v. Cross*, 8 Q. B. 714.

Where a person makes a deed settling his property to his own use during his life and after his death to the benefit of other persons, a power of revocation reserved in the deed does not alter its character and thus render it testamentary.—*Tompson v. Browne*, 3 Mylne & K. 32; *Spencer v. Robins*, 106 Ind. 580, 5 N. E. 726.

An instrument, in the form of a deed, executed jointly by a husband and wife, in favor of their children, was held a will because by the express terms of the instrument the property was not to pass to the children until after the death of the wife and until that event the property was to be held, owned and enjoyed by her, the husband by the terms of the instrument being appointed executor and was to keep the property for two years after the death of his

wife.—*Mosser v. Mosser's Exec.*, 32 Ala. 551. See, also, *Elmore v. Mustin*, 28 Ala. 309; *Allison's Exrs. v. Allison*, 4 Hawks (11 N. C.) 141; *Turner v. Scott*, 51 Pa. St. 126.

An instrument in the form of a deed contained the following reservation and condition: "First parties reserve unto themselves all the use, benefit and control of said land during the life of each or either of them. It is a part of the consideration of this conveyance that second party pay to each of his five sisters or their legal heirs the sum of fifty dollars on coming into possession of said land." It was held not testamentary.—*Reed v. Brown*, 184 Mich. 515, 151 N. W. 592.

An agreement of husband and wife with a granddaughter whereby, in consideration of her caring for them during their lives, they were to convey certain lands to the granddaughter upon the performance of the conditions, also all the other property they might own at the time of their death, was held not to be testamentary, but to convey an equitable fee.—*Phifer v. Mullis*, 167 N. C. 405, 83 S. E. 582. See, also, *Wimpey v. Ledford*, (Mo.) 177 S. W. 302.

A deed duly executed and deliv-

distinguishing feature in the two illustrations just given is that, in the first instance, had an estate in remainder been created, there would have been no reason for the maker of the instrument to have declared that the property was to go to the grantees absolutely and without condition after his death, for such would have been the case in the latter instance.⁸¹ If an instrument is in effect a deed, it can not be declared testamentary in character merely because it was executed and attested with the formalities appropriate to a will. Thus a deed of gift of property, with a warranty of title, wherein the grantor reserved the use of the land to himself for life, although it was duly executed and attested before the number of witnesses required for wills, was held not to be a testamentary instrument.⁸²

§ 60. An Instrument May in Part Be Effective Both as a Deed and as a Will.

An instrument may be impressed with a double character. Thus it may be a deed as to certain property regarding which it conveys a present interest, yet it may operate as a will as to other property; for instance, a party may in one single document convey a present interest in property to one person, either as a gift or for a consideration, and then in the same document bequeath or devise other property either to the same person or to another.⁸³

ered to a third person with instructions to deliver the same only after the death of the grantor, he reserving no right to recall the instrument, was held not testamentary. — *Innes v. Potter*, 130 Minn. 320, 153 N. W. 604.

⁸¹ *Symmes v. Arnold*, 10 Ga. 506.

⁸² *Williams v. Tolbert*, 66 Ga. 127.

⁸³ *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150; *Dudley v. Mallery*, 4 Ga. 52; *Robinson v. Schly*, 6 Ga. 515; *Burlington University v. Barrett*, 22 Ia. 60, 92 Am. Dec. 376.

§ 61. Instruments Testamentary in Character Are Invalid Unless Executed as Required by the Law of Wills.

An instrument, by reason of its testamentary nature and because of the fact that it was not executed with the formalities required in regard to wills, may fail to have any effect whatsoever, although it might have been effective had the maker intended it to operate during his life-time. Thus a written instrument which provided that "at my death my estate shall pay," etc., was held to be testamentary in character, but by reason of having been attested by one witness only, it created no claim against the estate of the maker.⁸⁴ A writing directing the grantor's bankers to hold certain bonds for the benefit of his wife and further declaring "the assignment to take effect at my death, I controlling them in the meanwhile," was construed testamentary in character, but was held invalid because not executed in the manner prescribed by statute for the making of wills.⁸⁵ A written contract wherein one agreed that in consideration of being supported during his life, all his personal property should at his death belong to another, was held not to constitute a will because informally executed.⁸⁶ If, however, through some technical defect the writing may not operate in the form in which it was intended and there is reasonable ground for doubt as to the true nature of the instrument, the courts will incline to that construction which will support the instrument rather than to allow it to have no effect whatever.⁸⁷ If, however, an instrument is definite in character, the courts are not at

⁸⁴ *Moore v. Stephens*, 97 Ind. 271.

⁸⁵ *Comer v. Comer*, 120 Ill. 420,
11 N. E. 848.

⁸⁶ *McCarty v. Waterman*, 84 Ind.
550.

⁸⁷ *Masterman v. Maberly*, 4 Eng.
Ecc. 108; s. c., 2 Hagg. Ecc. 235;
Moye v. Kittrell, 29 Ga. 677.

liberty to convert it into an instrument of a different nature.

§ 62. An Instrument May Be Void Both as a Deed and a Will

The effect which the maker intended, should be given to all instruments, irrespective of form or designation. Thus an instrument in the form of a deed and acknowledged as such will be declared a will if it appears that the manifest intent of the maker was that it was to take effect as a disposition of his property only after his death. If the instrument transferred a present interest in the property it would have to be declared a deed. If, however, it purported to transfer such present interest but was nugatory and conveyed no such interest, the law will give effect to the instrument as a will if it was executed with the proper formalities and would carry out the intent of the maker. But an instrument in the form of a deed and invalid as such will not be construed as a will, even though executed with the required formalities, if such construction would defeat the intention of the maker.⁸⁸ And, irrespective of the maker's intent, an instrument improperly executed according to the requirements of wills, will not be admitted to probate. Thus a document may be void both as a will and as a deed.⁸⁹

§ 63. Courts Will Not Violate the Law by Changing the Express Character of an Instrument.

An instrument in the form of a deed, executed according to the formalities required of wills but which can not take effect as a deed because of defects as to form, delivery,

⁸⁸ Gage v. Gage, 12 N. H. 371.

748, 151 Pac. 135; Goodale v.

⁸⁹ Habbergham v. Vincent, 2 Ves.

Evans, 263 Mo. 219, 172 S. W. 370.

Jun. 204; Rice v. Carey, 170 Cal.

and the like, will be admitted to probate as a will if so doing would carry out the intention of the maker. This is done, however, only in those cases where the instrument itself, according to its form, can take effect as a will and where it is shown that the intention of the maker was that the instrument should be testamentary in character, that is, pass an estate after his death. If the instrument is neither a will nor a deed, the courts will not allow it to be effective in either character, for the intention of the maker should be defeated rather than the general law be violated. A case may therefore arise in which an instrument in the form of a deed may be declared to be a will and then, because of not having been executed according to the required formalities, be declared void. If an instrument, according to the rules of construction, should be considered as a will, the courts will not construe it to be a deed although it fails as a will because of lack of proper execution. In such a case the intention of the maker was that the instrument should have a testamentary effect and the courts must, if lawful, give force to such intent. To change the character of an instrument would be to transform a will into a deed, thus making an irrevocable instrument out of one which is revocable, or, conversely, transforming a deed into a will, thus making revocable an instrument which in its very nature is revocable.⁹⁰

§ 64. The Presumption Arising Where a Will Consists of Several Sheets.

It is a legal presumption that the number and arrangement of the papers bound together and constituting the will as found at the testator's death, were the

⁹⁰ *Hester v. Young*, 2 Ga. 31.

same as at the time of the execution thereof.⁹¹ And this presumption was not rebutted in a case where on the death of the testator it was found that the original fourth page of his will had been removed and placed loose in his desk, that the original seventeenth page had been used by him in substitution of the fourth, and that the several pages had been tied together with tape.⁹² It may be proven, however, that a certain sheet was not in the will when executed,⁹³ or that a clause was inserted without authority.⁹⁴ In some cases, however, the courts seem to have inclined to the view that there was no presumption, having required in each case the person proposing the instrument to explain all suspicious phenomena.⁹⁵ Thus, where a will was written on several sheets of paper and fastened together with a string, whether any of them had been fraudulently added subsequent to execution was considered a question of fact for the jury.⁹⁶ It is not essential, however, that there should be actual mechanical connection between the papers presented for probate as a will.⁹⁷ And as to execution, unless there ex-

⁹¹ *Marsh v. Marsh*, 1 Sw. & Tr. 528; s. c., 30 Law J. Prob. 77; *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831; *In re Merryfield's Estate*, 167 Cal. 729, 141 Pac. 259.

Compare: *Bond v. Seawell*, 3 Burr. 1775; *Varnon v. Varnon*, 67 Mo. App. 534.

⁹² *Rees v. Rees*, L. R. 3 P. & D. 84. But see *Varnon v. Varnon*, 67 Mo. App. 534, where this presumption was rebutted. Actual proof will always overcome a presumption.

⁹³ *Miller v. Travers*, 8 Bing. 244.

⁹⁴ *Charles v. Huber*, 78 Pa. St. 448.

⁹⁵ *Smith v. United States*, 2

Wall. 232, 17 L. Ed. 788; *Bailey v. Taylor*, 11 Conn. 531, 534, 29 Am. Dec. 321; *Milliken v. Marlin*, 66 Ill. 13; *North River Meadow Co. v. Christ Shrewsbury Church*, 22 N. J. L. 424, 53 Am. Rep. 258; *Jordan v. Stewart*, 23 Pa. St. 244.

⁹⁶ *Ginder v. Farnum*, 10 Pa. St. 98.

⁹⁷ *Marsh v. Marsh*, 1 Sw. & Tr. 528; *Jones v. Habersham*, 63 Ga. 146; *Murrell v. Barnwall*, 110 Ala. 668, 20 So. 1021; *Schillinger v. Bawek*, 135 Ia. 131, 112 N. W. 210; *Sellards v. Kirby*, 82 Kan. 291, 108 Pac. 73, 28 L. R. A. (N. S.) 270, 136 Am. St. Rep. 110, 20 Ann. Cas.

ists a statutory provision to the contrary, a will, although consisting of several sheets, may be signed and attested on the last one only.⁹⁸

§ 65. Other Writings May Be Incorporated in a Will by Reference.

A will may incorporate in itself, by reference, other papers and documents.⁹⁹ Such writings need not all be verified by the signatures of the testator and the witnesses;¹ it is sufficient if they appear upon the last sheet

214; *Ela v. Edwards*, 16 Gray (82 Mass.) 91; *Murphy v. Clancy*, 177 Mo. App. 429, 163 S. W. 915.

The fact that a will is written on more than one sheet of paper is immaterial.—*Estate of Taylor*, 126 Cal. 97, 58 Pac. 454; *Estate of Merryfield*, 167 Cal. 729, 141 Pac. 259.

⁹⁸ *Cook v. Lambert*, 3 Sw. & Tr. 46; *Marsh v. Marsh*, 1 Sw. & Tr. 528; *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831; *Jones v. Habershaw*, 63 Ga. 146; *Wikoff's Appeal*, 15 Pa. St. 281, 53 Am. Dec. 597.

⁹⁹ *Sandford v. Vaughan*, 1 Philim. 39; *Molineux v. Molineux*, Cro. Jac. 144; *Hogg v. Lashley*, 3 Hagg. Ecc. 415, n; *Peacock v. Monk*, 1 Ves. 127; *Tomkyns v. Ladbroke*, 2 Ves. Sen. 591; *Singleton v. Tomlinson*, 3 App. Cas. 404; *Sheldon v. Sheldon*, 1 Rob. Ecc. 81; *Bizzey v. Flight*, 3 Ch. Div. 269; *In re Almosnino*, 1 Sw. & Tr. 508; s. c., 29 Law J. Prob. 46; *In re Harris*, L. R. 2 P. & D. 83; *In re Howden*, 43 Law J. Prob. 26; *In re Dickens*, 3 Curt. 60; *In re Willesford*, 3

Curt. 77; *In re Durham*, 3 Curt. 57; *In re Darby*, 10 Jur. 164; *Habergham v. Vincent*, 2 Ves. Jun. 204; *Beall v. Cunningham*, 3 B Mon. (Ky.) 390, 39 Am. Dec. 469; *Loring v. Sumner*, 23 Pick. (Mass.) 98; *Wilbar v. Smith*, 5 Allen (Mass.) 194; *Newton v. Seamen's Friend Soc.*, 130 Mass. 91, 39 Am. Rep. 433; *Harvey v. Chouteau*, 14 Mo. 587, 55 Am. Dec. 120; *Jackson v. Babcock*, 12 Johns. (N. Y.) 389; *Chambers v. McDaniel*, 28 N. C. 226; *Tonnele v. Hall*, 4 N. Y. 140.

Compare: *In re Sotheron*, 2 Curt. 831; *Dickinson v. Stidolph*, 11 Com. B. N. S. 341.

¹ *Marsh v. Marsh*, 1 Sw. & Tr. 528; *Ela v. Edwards*, 16 Gray (Mass.) 91; *Newton v. Seamen's Friend Soc.*, 130 Mass. 91, 39 Am. Rep. 433.

But compare: *Hartwell v. Martin*, 71 N. J. Eq. 157, 63 Atl. 754; *Booth v. Baptist Church*, 126 N. Y. 215, 28 N. E. 238; *Bryan's Appeal*, 77 Conn. 240, 107 Am. St. Rep. 34, 1 Ann. Cas. 393, 68 L. R. A. 353, 58 Atl. 748.

or upon that paper which incorporates the others within itself.² And although the testimonium clause may refer to the preceding sheets as having been signed, the will is not invalidated by reason of the testator's signature not appearing upon them.³ But where there were six pages constituting the writing offered for probate, the testator having written his name upon five of them, and upon the sixth page were the testimonium and attestation clauses and the signatures of the witnesses only, the writing on the fifth page breaking in the middle of a sentence and being continued on the sixth, although probate of only the first five pages was asked, the whole instrument was rejected.⁴

² Winsor v. Pratt, 5 Moore J. B. 484; s. c., 2 Brod. & B. 650; Tonenele v. Hall, 4 N. Y. 140; Wikoff's Appeal, 15 Pa. St. 281, 53 Am. Dec. 597; Martin v. Hamlin's Exrs., 4 Strob. L. (S. C.) 188, 53 Am. Dec. 673; Ginder v. Farnum, 10 Pa. St. 98.

Compare: Bond v. Seawell, 3 Burr. 1775; Marsh v. Marsh, 6 Jur. N. S. 380; s. c., 1 Sw. & Tr. 528; Rees v. Rees, L. R. 3 P. & D. 84.

If a testator in his will refers expressly to a paper already written and so describes it that there can be no doubt of its identity, and the will is properly executed and witnessed, the other paper, whether executed or not, becomes a part of the will and such reference has the same effect as if it

had been incorporated into the will. — Habergham v. Vincent, 2 Ves. Jun. 204, 228; Metham v. Duke of Devon, 1 Peere Williams, 529.

But if it is a declaration of a future intention, that by some future paper he is going to do something, it can not be supported under the idea of reserving by the limitation an appointment to certain uses. Such future instrument must be executed with all due formality in order to be effective. — Allison's Exrs. v. Allison, 4 Hawks (11 N. C.) 141.

³ Winsor v. Pratt, 5 Moore J. B. 484; s. c., 2 Brod. & B. 650.

⁴ Sweetland v. Sweetland, 4 Sw. & Tr. 9.

§ 66. The Same Subject: The Writing Must Have Been in Existence and Clearly Referred To. Proof of Identity Is Necessary.

A writing which becomes incorporated in a will by reference, becomes as much a part of the will as though set forth at length in the instrument and is admitted to probate as a part thereof. The writings which may be thus incorporated need not be executed and witnessed in the manner required of wills, and may consist of papers in the form of a deed or a memorandum as well as of a will or a codicil. In the first place, however, the writing referred to must be in existence at the time the will is executed. A testator can not make a part of his will some paper which he says he may or will prepare at a future time, for that would in effect be allowing testamentary dispositions to be made without due formality as to execution.⁵ Further than this, the writing must be identified by clear and satisfactory proof as the particular writing referred to.⁶ Such evidence may be parol, but is allowed only where the will itself has referred to other papers and is only for the purpose of identifying the writing referred to, not to add something to the will which was not expressly in

⁵ *Rose v. Cunynghame*, 12 Ves. Jun. 29; *Habergham v. Vincent*, 2 Ves. Jun. 204; *In re Sunderland*, L. R. 1 P. & D. 198; *Croker v. Lord Hertford*, 4 Moore P. C. C. 339; *Goods of Mathias*, 3 Sw. & Tr. 100; *Johnson v. Ball*, 5 DeG. & S. 85; *Langdon v. Astor*, 3 Duer (N. Y.) 477; *Thayer v. Wellington*, 9 Allen (91 Mass.) 283, 85 Am. Dec. 753; *Grabill v. Barr*, 5 Pa. St. 441, 47 Am. Dec. 418. But see *Hyde v. Hyde*, 3 Ch. Rep. 83.

⁶ *Singleton v. Tomlinson*, 3 App. Cas. 404; *Habergham v. Vincent*, 2 Ves. Jun. 204; *Bizzey v. Flight*, 3 Ch. Div. 269; *Goods of Sibthorp*, L. R. 1 P. & D. 106; *Estate of Willey*, 128 Cal. 1, 60 Pac. 471; *Baldwin's Exr. v. Barber's Exrs.*, 148 Ky. 370, 146 S. W. 1124; *Newton v. Seaman's Friend Soc.*, 130 Mass. 91, 39 Am. Rep. 433; *Baker's Appeal*, 107 Pa. St. 381, 52 Am. Rep. 478.

terms incorporated therein. If the writing is not properly identified, it must be rejected.⁷

§ 67. The Same Subject: Instances of Sufficient Reference and Identification.

Clear proof of the identity of any papers referred to,⁸ and of their existence at the time of the execution of the will,⁹ or of a codicil thereto,¹⁰ must be shown to the court either from the face of the instrument itself,¹¹ by direct and unmistakable reference,¹² internal sense

⁷ *Goods of Garnett*, (1894) P. 90; *Goods of Watkins*, L. R. 1 P. & D. 19, 198; *Keeler v. Merchants' Loan & Trust Co.*, 253 Ill. 528, 97 N. E. 1061; *In re Young's Estate*, 123 Cal. 337, 55 Pac. 1011; *Phelps v. Robbins*, 40 Conn. 250; *Chambers v. McDaniel*, 28 N. C. 226.

⁸ *Newton v. Seaman's Friend Society*, 130 Mass. 91, 39 Am. Rep. 433; *Smart v. Prujean*, 6 Ves. Jun. 560; *Wilkinson v. Adam*, 1 Ves. & B. 422; *Dillon v. Harris*, 4 Bligh N. S. 321; *Croker v. Hertford*, 4 Moore P. C. C. 339; *In re Greves*, 1 Sw. & Tr. 250; s. c., 28 Law J. Prob. 18.

⁹ *Ferraris v. Hertford*, 3 Curt. 477; *In re Hunt*, 2 Rob. Ecc. 622; *Van Straubensee v. Monck*, 3 Sw. & Tr. 6; s. c., 32 Law J. Prob. 21; *Aaron v. Aaron*, 3 DeGex & S. 475; *In re Gill*, L. R. 2 P. & D. 6; *In re Sunderland*, L. R. 1 P. & D. 198; *In re Mercer*, L. R. 2 P. & D. 91; *In re Pascall*, L. R. 1 P. & D. 606; *Fesler v. Simpson*, 58 Ind. 83; *Chambers v. McDaniel*, 28 N. C. 226.

Compare: *In re Hakewill*, 1

Deane 14; s. c., 2 Jur. N. S. 168; *In re Pembroke*, 1 Sw. & Tr. 250; s. c., 1 Deane 182; s. c., 2 Jur. N. S. 526.

¹⁰ *Allen v. Maddock*, 11 Moore P. C. C. 427; *In re Hunt*, 2 Rob. Ecc. 622; *In re Truro*, L. R. 1 P. & D. 201; *Crosby v. Mason*, 32 Conn. 482; *Thayer v. Wellington*, 9 Allen (91 Mass.) 283, 85 Am. Dec. 753; *Newton v. Seaman's Friend Society*, 130 Mass. 91; 39 Am. Rep. 433; *Harvey v. Chouteau*, 14 Mo. 587, 55 Am. Dec. 120; *Thompson v. Quimby*, 2 Bradf. Sur. (N. Y.) 449; *Tonnele v. Hall*, 4 N. Y. 140; *Wikoff's Appeal*, 15 Pa. St. 281, 53 Am. Dec. 597; *Pollock v. Glassell*, 2 Grat. (Va.) 439; *Johnson v. Clarkson*, 3 Rich. Eq. (S. C.) 305; *Chambers v. McDaniel*, 28 N. C. 226.

¹¹ *Baker's Appeal*, 107 Pa. St. 381, 52 Am. Rep. 478.

¹² *Singleton v. Tomlinson*, 3 App. Cas. 413; *In re Watkins*, L. R. 1 P. & D. 19; *In re Dallow*, L. R. 1 P. & D. 189; *In re Brewis*, 33 Law J. Prob. 124; *Newton v. Sea-*

and adaptation of parts,¹³ or by means of extrinsic evidence.¹⁴ If, however, the reference is distinct as to date, heading, and other particulars, and if the paper agrees in these respects with the description contained in the will, its previous existence is presumed, in the absence of circumstances or evidence tending to a contrary conclusion.¹⁵ Thus, a copy of a deed of gift attached to a letter, signed by the deceased and addressed to his sister, stating that the property described in the instrument was intended as a provision for her after his death, was admitted to probate.¹⁶ Notes made by a testator payable at his death, folded up with his will, clearly identified therein, and remaining in his possession until his death, were held to be a part of the will.¹⁷ Also three pages of maps referred to in the will as a part thereof, the property being devised by numbers corresponding to the maps, were admitted to probate together with the will.¹⁸ So, too, a duly executed codicil, headed "This is a codicil to my last will and testament," has been allowed to give effect to an unattested will found among the testatrix's papers in an envelope marked "Mrs. Ann Foote's will," although, as was observed in the judgment, since the statutes of 7 William IV, and I Victoria, ch. 26,

man's Friend Society, 130 Mass. 91, 39 Am. Rep. 433; Bailey v. Bailey, 52 N. C. 44.

Compare: *In re Ash*, 1 Deane 14; s. c., 2 Jur. N. S. 526.

¹³ *Bond v. Seawell*, 3 Burr. 1773; *Wikoff's Appeal*, 15 Pa. St. 281, 53 Am. Dec. 597.

¹⁴ *Marsh v. Marsh*, 1 Sw. & Tr. 528; *Gould v. Lakes*, L. R. 6 Prob. Div. 1; s. c., 49 Law J. Prob. 59; *Ela v. Edwards*, 16 Gray (82 Mass.) 91; *Newton v. Seaman's*

Friend Society, 130 Mass. 91, 39 Am. Rep. 433.

See contra: *Baker's Appeal*, 107 Pa. St. 381, 52 Am. Rep. 478; s. c., 4 Am. Prob. Rep. 128.

¹⁵ *Swete v. Pidsley*, 6 Notes of C. 190.

¹⁶ *Skerrett's Estate*, 67 Cal. 585, 8 Pac. 181.

¹⁷ *Fickle v. Snepp*, 97 Ind. 289, 49 Am. Rep. 449.

¹⁸ *Tonnele v. Hall*, 4 N. Y. 140.

“No paper not properly executed and attested can in strictness be for any purpose a will or codicil.”¹⁹ The revoked will of a testatrix’s husband, described by its date and the circumstance of having been revoked, was held to constitute a part of her will.²⁰ Likewise entries on a designated page in a ledger,²¹ or in a certain memorandum book clearly pointed out, are allowed to be incorporated in the will.²² Again, a testatrix made her will in due form in 1878, providing for her niece, Isabella. After her death, which occurred suddenly in 1880, among her papers was found a sealed envelope indorsed in her handwriting, “Dear Bella, this is for you to open.” Within was a promissory note payable to testatrix and a paper in her handwriting saying, “Oct. 2, 1879; my wish is for you to draw this two thousand dollars for your use should I die sudden, Elizabeth Fosselman.” It was held that the indorsement on the envelope and the contents thereof constituted together a valid testamentary disposition of the note to the niece, and was a codicil to the will.²³

§ 68. The Same Subject: Instances of Insufficient Reference and Identification.

But a schedule not identified in the will, although signed by a witness, can not be admitted as a part of the will.²⁴ And in another case, a testatrix referring to her husband’s will said: “As the legacies which my husband and myself desire to leave are provided for in

¹⁹ *Allen v. Maddock*, 11 Moore Society, 130 Mass. 91; 39 Am. Rep. P. C. C. 427. 433.

²⁰ *In re Durham*, 3 Curt. Ecc. 57.

²³ *Fosselman v. Elder*, 98 Pa. St.

²¹ *Quihampton v. Going*, 24 159.

Week, R. 917.

²⁴ *Fickle v. Snepp*, 97 Ind. 289,

²² *Newton v. Seaman’s Friend* 49 Am. Rep. 449.

his will, I give," etc.; it was ruled that the husband's will formed no part of that of the testatrix and need not be filed for the purpose of probate record.²⁵ Again, where a testator on the first page of a sheet of paper made a formally executed will leaving all his estate to his wife absolutely, and on the third page followed what he designated as a memorandum for her and a writing directed "to whom it may concern," expressing a wish that the children should be remembered by her, it was held that these writings constituted no part of the will, and did not affect the absolute estate conveyed therein.²⁶ So, too, in another case where a will was written, signed, and attested on one side of a sheet of paper, bequeathing certain amounts, "as hereinafter named," with no further explanation, and on the other side of the sheet were twenty lines in the testator's handwriting, it was decided that the reference to matters "hereinafter" was not a sufficient description to incorporate in the will the writing on the opposite side.²⁷ It is usual and proper that the paper referred to should be set out in the probate; but this is not absolutely necessary in order to bring it within the cognizance of the court of construction.²⁸ And where by reason of mistake this was not done, it may be admitted to probate after the will, and after the time for appeal has expired.²⁹

²⁵ Myer's Estate, Myrick's Prob. (Cal.) 205.

²⁶ Bowlby v. Thunder, 105 Pa. St. 173.

²⁷ Dennett v. Taylor, 5 Redf. Sur. (N. Y.) 561.

²⁸ In re Lansdown, 3 Sw. & Tr. 194; s. c., 32 Law J. Prob. 142; In re Dundas, 32 Law J. Prob. 165; In re Limerick, 2 Rob. Ecc. 313;

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In re Battersbee, 2 Rob. Ecc. 439; In re Sibthorp, L. R. 1 P. & D. 106; Bizzey v. Flight, L. R. 3 Ch. Div. 269.

Compare: In re Dickens, 3 Curt. 60; Singleton v. Tomlinson, 3 App. Cas. 404.

²⁹ Newton v. Seaman's Friend Society, 130 Mass. 91; 39 Am. Rep. 433.

CHAPTER IV.

JOINT, MUTUAL OR RECIPROCAL WILLS.

- § 69. Separate wills may be in one document.
- § 70. Mutual testaments under the civil law.
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- § 99. The same subject: Where the agreement to make mutual wills appears on the face of the instrument.
- § 100. The Statute of Frauds as affecting oral agreements to make mutual wills of real property: Part performance.
- § 101. The same subject: Does the statute refer to ownership at date of agreement or at time of death?

§ 69. Separate Wills May Be in One Document.

In many decisions it will be found that testamentary dispositions are referred to as a joint or mutual or reciprocal will; this, however, is incorrect for no matter what the form of the will may be and although two or more persons may jointly execute a single testamentary document, the instrument is the separate will of each testator and its legal effect is separate and distinct and not joint. In this regard there can not be a joint will.¹ Two or more persons can undoubtedly make separate wills in favor of each other or of some third party; but there is no legal objection to making the same dispositions by one document. The law does not hold it to be a single will because all the makers have subscribed the same instrument or have declared it to be their last will and testament in the presence of the same witnesses and

¹ *Lewis v. Scofield*, 26 Conn. 452, 68 Am. Dec. 404.

at the same time, but views it as the separate act of each. After the death of the one first dying, the instrument may be offered and proved for probate as his will and the signatures, declarations and acts of the others, although they may be admitted in evidence as part of the *res gestæ*, may be regarded as surplusage in so far as proving the will of the one deceased is concerned.² The same testamentary document may thereafter, in the event it has not been revoked by a survivor, be admitted to probate as his will. The property disposed of may be joint or separate, but the declared intentions of each testator affect only his own property or his share in joint property.³

§ 70. Mutual Testaments Under the Civil Law.

Mutual testaments of two or more persons were approved by the civil law, but conditions in a will "that

² Ex parte Day, 1 Bradf. (N. Y.) 476; In re Rogers, Appellant, 11 Me. 303; Allen v. Allen, 28 Kan. 18; Chaney v. Home etc. Society, 28 Ill. App. 621.

A paper purporting to be the will of a husband and wife, which was all in the handwriting of the husband except the signature of the wife, was admitted to probate as the holographic will of the husband, the signature of the wife being surplusage.—In re Cole's Will, 171 N. C. 74, 87 S. E. 962.

³ Goods of Lovegrove, 2 Sw. & Tr. 453; Denyssen v. Mostert, L. R. 4 P. C. 236; Dias v. De Livera, 5 App. Cas. (P. C.) 123; Schumaker v. Schmidt, 44 Ala. 454, 4 Am. Rep. 135; Estate of Learned, 156 Cal. 309, 104 Pac. 315; Evans v.

Smith, 28 Ga. 98, 73 Am. Dec. 751; Murphy v. Black, 41 Iowa 488; Keith v. Miller, 174 Ill. 64, 51 N. E. 151; Gebrich v. Freitag, 213 Ill. 552, 104 Am. St. Rep. 234, 2 Ann. Cas. 24, 73 N. E. 338; Hill v. Harding, 92 Ky. 76, 17 S. W. 199, 437; Gould v. Mansfield, 103 Mass. 408, 4 Am. Rep. 573; Bower v. Daniel, 198 Mo. 289, 95 S. W. 347; Ex parte Day, 1 Bradf. (N. Y.) 476; In re Raupp, 31 N. Y. Supp. 680, 10 Misc. Rep. 300; Matter of Diez, 50 N. Y. 88; In re Davis' Will, 120 N. C. 9, 58 Am. St. Rep. 771, 38 L. R. A. 289, 26 S. E. 636; Betts v. Harper, 39 Ohio St. 639, 48 Am. Rep. 477; In re Cawley's Estate, 136 Pa. St. 628, 10 L. R. A. 93, 20 Atl. 567; Prince v. Prince, 64 Wash. 552, 117 Pac. 255.

are contrary to good manners'' were unlawful. Thus, a will was unlawful where a testator disposed of his property to another or instituted such other as his heir or executor upon the condition that he should receive a like benefit. The rule of the civil law, however, did not include mutual testaments where, for instance, by reason of love, affection or family ties, two parties mutually or reciprocally instituted each other as heir or executor, where the disposition was made by reason of affection, which is a just cause, and such wills were not made as an inducement offered by one to the other to make such a will.⁴

§ 71. The Terms "Joint," "Mutual" and "Reciprocal" Defined.

There has been some confusion as to the exact meaning of the terms joint, mutual and reciprocal. The term "joint" has often been applied to wills where two or more persons have joined in the execution of a single document, and has likewise been applied where two testators dispose of property owned by them jointly. Joint wills, to distinguish the same from mutual or reciprocal wills, might best be illustrated by two testators jointly making a disposition of their property, in whole or in part, to a third person, such wills being joint because jointly executed for the purpose of transferring property to one devisee. If two persons make testamentary dispositions of their property in favor of each other or to the

⁴ Domat, Pt. 2, Lib. 3, Tit. 1, § 8, Art. 20; Digest, Lib. 28, Tit. 5.

Mutual or reciprocal wills are to an extent prohibited in Louisiana, the statute providing that "a testament can not be made by the same

act by two or more persons, either for the benefit of a third person, or under the title of reciprocal or mutual disposition."—La. Civ. Code, Art. 1571; *Orelina v. Heirs of Haggerty*, 12 La. Ann. 880.

survivor, whether in one or two documents, they are mutual or reciprocal wills.⁵

§ 72. Strict Construction of the Term "Joint Will."

Strictly speaking, the law does not recognize such a thing as a "joint will" in the sense that two or more persons can jointly make one will. A will is the lawful intent of a competent person, legally expressed, regarding his estate and effective after his death. It must be the sole act of one person, declaring his intentions regarding what he wishes to be performed after his demise. It is inoperative during the life of the testator and is ambulatory in character. If two persons could jointly execute a single will, it could not be revoked except by the consent of both, since revocation requires the exercise of as much power as does the making of the will. To deprive a testator of the right of altering his intentions regarding the disposition of his property would destroy the very essence of a will.⁶

§ 73. English Cases Construing Joint Wills.

There has been great confusion among decisions as to what really constitutes a "joint will" and as to its validity. The principle that there could not be a "joint will" was applied in the early case of *Hobson v. Blackburn*, 1 Addams 274, which has been widely quoted. A review of that case and of others following and distinguishing it, will best explain the nature of the so-called "joint will." In *Hobson v. Blackburn*, *supra*, a testamentary instrument jointly executed by three persons was pre-

⁵ *Campbell v. Dunkelberger*, 172 Iowa 385, 153 N. W. 56; *In re Cawley's Estate*, 136 Pa. St. 628, 10 L. R. A. 93, 20 Atl. 567.

⁶ *Swinb. Wills*, Pt. VII, Sec. XV; *Forse and Hembling's Case*, 4 Coke 60b; *Vynior's Case*, 8 Coke 81b.

sented for probate as the will of one of the testators, although it had been revoked by such testator prior to his death. The joint will was presented upon the motion that it was irrevocable. Sir John Nicholl rejected the document upon the principle that a joint will of that nature was unknown to the testamentary law of England. He stated that such a document might be valid as a compact between the parties and operative in equity to the extent of declaring the devisees under it to be trustees for the performance of the deceased's part of the contract, but if converted into a contract, the probate court had no jurisdiction. He further stated that the idea of the will being irrevocable destroyed the very essence of the will. The statement in the above case that there could not be a "joint will" was unnecessary to its determination, but such statement has been widely quoted and followed in many decisions; it affected the writings of Jarman on Wills and Williams on Executors who have often been quoted as upholding the principle above mentioned.

The decision in *Earl of Darlington v. Pulteney*, 1 Cowp. 260, was similar, wherein Lord Mansfield stated that there could not be a joint will. The validity of joint wills, however, was not involved in that case, as the point at issue was the proper execution of a certain power and the decision was that it should have been by deed rather than by will.

§ 74. Early English Cases Distinguished.

In *Goods of Stracey*, 1 Deane & Sw. 6, a joint will of a husband and wife disposing of property over which each had the power of appointment, was held valid; the case of *Hobson v. Blackburn*, *supra*, being distinguished. Following this, in the case of *Goods of Raine*, 1 Sw. & Tr. 144,

where two persons had executed one instrument wherein neither willed anything to the other and the document was, by its terms, to have no effect until the death of both, probate was denied, it being held that it was not a mutual will because it did not purport to leave anything to the survivor, nor a joint will as in the case of *Goods of Stracey*, *supra*. The case of *Goods of Raine*, *supra*, was subsequently disapproved in *Goods of Miskelly*, *Irish Rep.* 4 Eq. 62.

§ 75. The Present Rule in England.

The present law of England may be illustrated by the decisions in *Goods of Lovegrove*, 2 Sw. & Tr. 453, where a mutual will was held good as the will of the one first dying, it not having been revoked; and in *Denyssen v. Mostert*, L. R. 4 P. C. 236, where a will by a husband and wife in favor of each other was called a mutual will but construed as a separate will of each, the disposition made by each testator being applicable only to his or her separate property or interest in joint property.

§ 76. American Cases Construing Joint Wills.

In the United States, upon the authority of *Earl of Darlington v. Pulteney* and *Hobson v. Blackburn*, *supra*, the court, in *Clayton v. Liverman*, 19 N. C. 558, rejected a testamentary document, jointly executed by two sisters, which devised their property to third parties "after their decease." The court held that this instrument which declared by its terms that it was the united will of two persons and was designed to take effect after the death of both, could not be admitted to probate as the joint will of both or as the separate will of either, although the two testators died within a few days of each other. The court said that the paper did not purport to be the sep-

arate will of each but was a joint disposition of joint property after the death of both and that it could not be held the separate will of either because that would be declaring it to be what it was not. The court further said that where such a document, although testamentary in form, manifests no more than an agreement between two persons, it can not be held testamentary in character; that it could not be held the separate declared intention of one, but rather a conclusion reached by an interchange of opinions and a compromise of interests in regard to property not exclusively belonging to either. Judge Daniels wrote a strong dissenting opinion.

The case of *Clayton v. Liverman*, *supra*, was superseded in the *Will of Davis*, 120 N. C. 9, 58 Am. St. Rep. 771, 38 L. R. A. 289, 26 S. E. 636, where the will of a husband and wife who had jointly devised property to a third person, was admitted to probate as the will of the husband, the wife at such time still being alive. The court, however, called attention to the fact that there was nothing in the will intimating survivorship or when it was to become operative, whether upon the death of one or both.

In *Lewis v. Scofield*, 26 Conn. 452, 68 Am. Dec. 404, a mutual will was held to be the separate will of the one first dying. In *State Bank, Admr. v. Bliss*, 67 Conn. 317, 35 Atl. 255, a testamentary document executed by two sisters which described itself as a joint will, was held invalid. The court said that as the instrument provided in terms that it should be probated only after the death of both testators, it was contrary to the declared principle that wills should be probated as soon as may be after the testator's death; also that such delay in probating the will would raise difficulties as to the payment of legacies and as to the care and management of the estate in

the meantime. In *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135, however, the court stated that two or more may execute a joint will which will be the separate will of each and require a separate probate on the death of each; but further said that if the will so provides and the disposition of the property requires it, the probate may be delayed until the death of both or all testators.

In *Walker v. Walker*, 14 Ohio St. 157, 82 Am. Dec. 474, a testamentary document was jointly executed by a husband and wife, each owning separate property, wherein each devised one-third of his and her individual property to the survivor for life, and jointly disposed of the remainder to other persons, the reciprocal bequests being by each separately, the other dispositions reading "we give and bequeath unto," etc. The instrument further declared "that in case either of us shall decease, the other surviving, the above will is to operate and be in force on the estate of such deceased person, from the time of his or her decease." The court relied upon *Hobson v. Blackburn* and *Clayton v. Liverman*, *supra*, and held the document to be neither the joint will of both nor the separate will of either. The case of *Walker v. Walker*, *supra*, was distinguished in the case of *Betts v. Harper*, 39 Ohio St. 639, 48 Am. Rep. 477, in which a joint will, open to all the objections raised in the former case, was declared valid.

§ 77. Rule in England and in the United States.

It is now well settled both in England and in the United States that joint, mutual or reciprocal wills, whether executed in one document or more, are valid as the separate wills of the testators. The separate will of each testator affects only his property or his interest in joint property, and becomes operative only at his death.

§ 78. Construction of Joint Wills Controlled by Contents.

A testamentary document jointly executed by two persons may declare in terms that it is the joint will of both and that the property disposed of shall pass to the devisees named after the death of the survivor, yet such an instrument may be admitted to probate in certain cases. The use of the word "joint" does not alter or affect the provisions of the will and the contents must control; thus, where the surviving husband or wife would have been entitled to all the property of the other disposed of by a testamentary document jointly executed by both, in the event such other had died intestate, and the instrument contains nothing which would prevent revocation, there would be no impropriety in postponing the right of the beneficiaries to receive such property until after the death of both testators.⁷

⁷ In *re Raupp's Will*, 10 Misc. 300, 31 N. Y. Supp. 680.

See, also, *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135.

In *Black v. Richards*, 95 Ind. 184, a single testamentary document executed by two sisters, giving certain property to the survivor for life and after the death of both the property to go to third parties, and which instrument also gave legacies to others, was held to have been properly admitted to probate as the will of both after the death of both and was not open to attack in an action of partition.

As to the admissibility of evidence of parol declarations and surrounding circumstances to show the nature of an instrument of-

ferred for probate, see, ante, §§ 51, 52, 53.

As to the admissibility of extrinsic evidence as affecting the question of revocation, see, ante, § 54.

As to the evidence necessary to establish agreements to execute mutual or reciprocal wills, see, post, §§ 92, 93.

As to the admissibility of extrinsic evidence to show whether or not the maker of a will intended it to be conditional, see, post, §§ 110, 111, 112.

As to the extent to which parol declarations of a testator may be admitted to prove or disprove revocation, see, post, §§ 124, 125, 126.

As to the evidence necessary to prove a contract to make a will, see, post, §§ 136, 138, 139.

§ 79. The Rule in Cases Where the Property Is to Pass Only After the Death of Both Joint Makers.

Cases may arise, however, which are very difficult of solution, such as where a testamentary document jointly executed by two parties distinctly states that the property bequeathed or devised is not to pass until after the death of both and that it shall not be offered for probate until that time. In such an instrument various legacies may have been made to the survivor and also to third parties. The survivor can receive no benefit under the will if it can not become effective until after his death. The question then arises as to what is to become of the estate of the one first dying, pending the death of the other; also how can such estate be managed or conserved, how shall the debts of the decedent be paid, and, in the meantime, what is to become of the legacies to third parties? The interpretation of such a document depends upon the general rules of construction, and if those parts of the joint instrument which are invalid under the testamentary law are so related to other parts of the will that they can not be separated and distinguished, the whole instrument must fall.⁸

⁸ State Bank, Admr., v. Bliss, 67 Conn. 317, 35 Atl. 255.

As to the admissibility of evidence of parol declarations and surrounding circumstances to show the nature of an instrument offered for probate, see, ante, §§ 51, 52, 53.

As to the admissibility of extrinsic evidence as affecting the question of revocation, see, ante, § 54.

As to the evidence necessary to establish agreements to execute mutual or reciprocal wills, see, post, §§ 92, 93.

As to the admissibility of extrinsic evidence to show whether or not the maker of a will intended it to be conditional, see, post, §§ 110, 111, 112.

As to the extent to which parol declarations of a testator may be admitted to prove or disprove revocation, see, post, §§ 124, 125, 126.

As to the evidence necessary to prove a contract to make a will, see, post, §§ 136, 138, 139.

§ 80. Wills in Their Nature Are Revocable.

A will is not operative during the life of the testator and may be altered or revoked so long as the maker retains his testamentary capacity, without which he could not make a will. To hold that a will was irrevocable would be to deprive a testator of the right of altering his intentions regarding the disposition of his property. It is not within the power of any person to make a will which he can not alter or revoke, because no man can "alter the judgment of the law to make irrevocable, which is of its nature revocable."⁹

§ 81. Revocation of Joint Wills.

Difficulty has sometimes arisen as to the construction of a testamentary document executed jointly by two or more persons which declares on its face that it is the "joint will" of the testators or that it is not to become effective until after the death of all. The question in such cases is whether the makers intended to postpone the vesting of title to the property in the various beneficiaries until after the death of all of the makers, and if so, whether such a provision under the particular circumstances of the case would be reasonable. The construction of such stipulations in wills has often been presented to courts of equity in cases involving the enforcement of a contract to make a will, the point at issue being whether a will executed jointly by two or more parties was the result of a contract between the makers and if so, whether the contract itself should be enforced. In such cases the courts have sometimes said that the joint or mutual will was irrevocable, whereas the decisions in

⁹ Swinb. Wills, Pt. VII, Sec. XV; Coke 60b; Vynior's Case, 8 Coke Forse and Hembling's Case, 4 81b.

legal effect were that the agreement which resulted in the will, being founded on a sufficient consideration and being valid, could be enforced; or that the survivor of two testators who had joined in the execution of a testamentary document, had received benefits or advantages under the will of the other so that it would be inequitable for him to change his will, that of the other having become irrevocable by reason of death. In such cases equity will impose a trust.

§ 82. Early English Decisions Regarding Revocation of Mutual Wills.

One early decision has left its imprint upon the law regarding the revocation of joint or mutual wills. In the case of *Dufour v. Pereira*, 1 Dick. 419, decided A. D. 1769, a husband and wife, pursuant to an agreement, jointly executed a testamentary document. Subsequently the husband died and the instrument was admitted to probate as his will; later the wife made a different will. On the subject of revocation, Lord Camden said that the mutual will might have been revoked by both testators jointly or by either separately, provided the party intending to revoke had first given notice to the other of his purpose; but that such a will could not be revoked during the joint lives of the two makers by either secretly nor by the survivor after the death of the other. The true force of Lord Camden's decision was that the joint will was the result of a contract between the parties which could not be rescinded without the consent of both and that one of the makers of such will having died and his part of the contract having been carried into execution, the court would not permit the other to violate the agreement; that there was a reciprocity which ran throughout

the instrument and that the property of both testators had been put in a common fund and that every devise was the joint devise of both. Further, in the foregoing case, the wife had received benefits under the will executed by her husband and herself. It is an established rule that equity will not allow one person to receive advantage under a contract and then refuse to perform his part of the agreement.

§ 83. The Case of *Dufour v. Pereira* Distinguished.

The decision in *Walpole v. Orford*, 3 Ves. Jun. 402, decided A. D. 1797, was handed down by Lord Loughborough, who had been of counsel in the case of *Dufour v. Pereira*, *supra*, which case he distinguishes and explains. It is shown that in the former case the document was considered as a contract rather than as a testament. In the latter case a mutual will, which had been subsequently revoked, was denied probate. Lord Loughborough said that an agreement might be implied from the contemporary execution of two mutual wills and from surrounding circumstances, that it might be considered an honorable engagement between the parties but that he could not direct the execution of such an agreement which rested upon nicer points than a court of justice could decide upon. He held that such an agreement would not be executed unless its terms were clear, certain and defined, unless the terms were equal and fair, and unless the agreement be proved in the manner required by law.

§ 84. Mutual Wills Refused Probate if Revoked.

Although two persons may jointly execute a single document as their last wills, as has been before stated, the instrument must stand as the separate will of each. If such testamentary disposition of one has been revoked

by a subsequent will, the probate court can not refuse to admit the last will to probate upon the ground that the joint or mutual will was executed pursuant to an agreement and that the latter will was in violation of the terms of a contract theretofore entered into between the two testators. The jurisdiction to determine the existence of and to enforce a contract to make a will is exclusively within a court of equity, and a court of probate can only view the instrument presented in the light of a will and not in the light of an agreement.¹⁰ Even though there may have been a valid contract to make a will, no action will lie to prevent the probate of a will different from that agreed upon, because it is the agreement which is enforced in equity by declaring the executor or devisees under such will to be trustees for the performance of the contract and therefore it is necessary that such will be admitted to probate.¹¹

§ 85. The Mere Execution of Mutual Wills Is Not Conclusive Proof of a Contract.

The general rule seems to be, although not undisputed, that if two persons execute wills at the same time, either in one or two instruments, making reciprocal dispositions in favor of each other, the mere execution of such wills does not impose such a legal obligation as will prevent revocation, without notice, by either during their joint lives.¹² The case is different, however, where the mutual

¹⁰ Walpole v. Orford, 3 Ves. Jun. 402; Pohlman v. Untzellman, 2 Lee Ecc. 319; Hughes v. Turner, 4 Hagg. 30; Sumner v. Crane, 155 Mass. 483, 15 L. R. A. 447, 29 N. E. 1151.

¹¹ Allen v. Bromberg, 147 Ala. 317, 41 So. 771; In re Burke's Es-

tate, 66 Ore. 252, 134 Pac. 11; Bolman v. Overall, 80 Ala. 451, 60 Am. Rep. 107, 2 So. 624; In re Cawley's Estate, 136 Pa. St. 628, 10 L. R. A. 93, 20 Atl. 567.

¹² Denyssen v. Mostert, L. R. 4 P. C. 236; Wanger v. Marr, 257 Mo. 482, 165 S. W. 1027; overrul-

or reciprocal wills are the result of a contract based upon a valid consideration, where there has been a joining of property interests for the purpose of making a testamentary disposition of the same, or where, after the death of one, the survivor has accepted benefits under the will of the other which was executed pursuant to an agreement. In such cases, where all the facts are fully established, equity will interpose to prevent fraud. This, however, can be accomplished only through a court of equity, the probate court having no jurisdiction.¹³

The weight of authority is that such agreements to make wills are not established merely because two persons have made reciprocal testamentary dispositions in favor of each other, the language of such wills containing nothing to the effect that the instruments were the result of a contract. Some jurisdictions, however, have held that such fact causes the presumption to arise that the wills were executed pursuant to an agreement. The reasoning in such cases, however, does not seem cogent and general facts and circumstances are included to aid in arriving at the conclusion. Of course, in a proper case, where the question of a contract arises, the fact of the execution of mutual or reciprocal wills may be intro-

ing *Bower v. Daniel*, 198 Mo. 289, 325, 95 S. W. 347; *Edson v. Parsons*, 85 Hun (N. Y.) 263, 32 N. Y. Supp. 1036; affirmed in *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265; *In re Davis' Will*, 120 N. C. 9, 58 Am. St. Rep. 771, 38 L. R. A. 289, 26 S. E. 636; *In re Cawley's Estate*, 136 Pa. St. 628, 10 L. R. A. 93, 20 Atl. 567; *Prince v. Prince*, 64 Wash. 552, 117 Pac. 255.

In *Ex parte Day*, 1 Bradf. (N. Y.) 476, the court says that the fact

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that "because the will happens to be made in conformity to some agreement, or contains on its face matter of agreement, or shows mutuality of testamentary intention between two persons, and a compact or intention not to revoke, it is none the less a will."

¹³ *In re Sandberg's Will*, 75 Misc. Rep. 38, 134 N. Y. Supp. 869; *In re Davis' Will*, 120 N. C. 9, 58 Am. St. Rep. 771, 38 L. R. A. 289, 26 S. E. 636.

duced in evidence as tending to prove a contract, but it is not conclusive. Even though a presumption is claimed, yet a presumption should not take the place of proof. It should require something more than the mere making of reciprocal testamentary dispositions to convert a revocable instrument into an irrevocable compact. And where such wills are executed by relatives because of love, affection or family ties, such facts would seem to negative any agreement between the parties based upon a fixed condition. In the absence of fraud or an agreement the survivor may revoke his will, although the other has died and his will has therefore become irrevocable.¹⁴

¹⁴ Denyssen v. Mostert, L. R. 4 P. C. 236; Schumaker v. Schmidt, 44 Ala. 454, 4 Am. Rep. 135; Carmichael v. Carmichael, 72 Mich. 76, 16 Am. St. Rep. 528, 1 L. R. A. 596, 40 N. W. 173; Wanger v. Marr, 257 Mo. 482, 165 S. W. 1027; Ex parte Day, 1 Bradf. (N. Y.) 476; Herrick v. Snyder, 27 Misc. Rep. 462, 59 N. Y. Supp. 229; Edson v. Parsons, 85 Hun (N. Y.) 263, 32 N. Y. Supp. 1036; Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265; In re Davis' Will, 120 N. C. 9, 58 Am. St. Rep. 771, 38 L. R. A. 289, 26 S. E. 636; Sappingfield v. King, 49 Ore. 102, 109, 8 L. R. A. (N. S.) 1066, 89 Pac. 142, 90 Pac. 150; In re Cawley's Estate, 136 Pa. St. 628, 10 L. R. A. 93, 20 Atl. 567; Wilson v. Gordon, 73 S. C. 155, 160, 53 S. E. 79, 81; Wyche v. Clapp, 43 Tex. 543; Prince v. Prince, 64 Wash. 552, 117 Pac. 255.

But see: Campbell v. Dunkelberger, 172 Iowa 385, 153 N. W. 56; Breathitt v. Whittaker's Ex'rs,

8 B. Mon. (47 Ky.) 530; Bower v. Daniel, 198 Mo. 289, 325, 95 S. W. 347.

Overruled in Wanger v. Marr, 257 Mo. 482, 165 S. W. 1027; Brown v. Webster, 90 Neb. 591, 37 L. R. A. (N. S.) 1196, 134 N. W. 185; Rastetter v. Hoenninger, 151 App. Div. 853, 136 N. Y. Supp. 961; affirmed in Rastetter v. Hoenninger, 214 N. Y. 66, 108 N. E. 210.

In Wanger v. Marr, 257 Mo. 482, 165 S. W. 1027, the court distinguished and questioned the decision in Bower v. Daniel, 198 Mo. 289, 325, 95 S. W. 347, stating that it had incorrectly quoted from the decision of Carmichael v. Carmichael, 72 Mich. 76, 16 Am. St. Rep. 528, 1 L. R. A. 596, 40 N. W. 173, and held that in so far as the case of Bower v. Daniel had ruled that the execution of a joint will was enough in itself to show an agreement, it was not supported by authority.

This case also quoted with ap-

§ 86. Revocation of Mutual Wills in Some Cases Can Cause No Injury.

As wills in their nature are ambulatory and can not become effective until the death of the maker, there seems to be no reason why, even in equity, mutual or reciprocal wills, executed by two persons in favor of the other who should survive the one dying first, should not be revoked, without notice, at any time during their joint lives, or

proval *Edson v. Parsons*, 155 N. Y. 568, 50 N. E. 265, to this effect: "To attribute to a will the quality of irrevocability demands the most indisputable evidence of the agreement which is relied upon to change its ambulatory nature, and that presumptions will not, and should not, take the place of proof."

To the same effect: *Wilson v. Gordon*, 73 S. C. 155, 160, 53 S. E. 79, 81; *Sappingfield v. King*, 49 Ore. 102, 109, 8 L. R. A. (N. S.) 1066, 89 Pac. 142, 90 Pac. 150; *Herrick v. Snyder*, 27 Misc. Rep. 462, 59 N. Y. Supp. 229.

The case of *Campbell v. Dunkelberger*, 172 Iowa 385, 153 N. W. 56, follows the case of *Bower v. Daniel*, *supra*, to the effect that a contract could be implied from the terms of a joint will, this language being quoted: "This aged and infirm couple, each owning property, made said will together, for the purpose of disposing and distributing their property equitably among their children; that the provisions of the will were reciprocal; and that but for these mutual bequests the parties would, in all probabilities, have made sep-

arate wills." The case of *Campbell v. Dunkelberger*, *supra*, however, holds that to deny a testator the right of revocation, the will itself must show an agreement not to revoke or such agreement must be established by clear and satisfactory evidence; but even in such cases either party to joint or mutual wills can revoke his testament by giving notice to the other.

In *Brown v. Webster*, 90 Neb. 591, 37 L. R. A. (N. S.) 1196, 134 N. W. 185, the court held that where a husband and wife had orally agreed that the survivor should have all the property of the one first dying and had executed reciprocal wills to carry out the agreement, the execution of the will by the wife and her keeping her part of the contract by never revoking her will, was such part performance of the agreement as would take the case out of the statute of frauds and was a good consideration for the contract, the court holding further that the agreement and the execution of the wills was all part of the contract and constituted a single transaction. The husband be-

even by the survivor after the probate of the will of the one first dying. The instance referred to is where the property of each testator is to go to the other only, there being no bequests or devises to third persons or any remainder over. In such a case no third party could be injured. The survivor could not be injured by his own revocation and the one who is already dead could receive no benefit under the will of the one still living. The first decedent could have received no benefit during his

fore his death having made a different will from the one agreed upon and without notice to his wife, specific performance of the contract was decreed.

In *Breathitt v. Whittaker's Ex'rs*, 3 B. Mon. (47 Ky.) 530, the court held that to revoke a will requires the same exercise of power as to make a will and that if two minds unite in a testamentary disposition, the same two minds must unite to revoke it. In this case, however, the court apparently viewed the document in the light of the exercise of a joint power.

The case of *Rastetter v. Hoenninger*, 151 App. Div. 853, 136 N. Y. Supp. 961, affirmed in *Rastetter v. Hoenninger*, 214 N. Y. 66, 108 N. E. 210, was an action to specifically enforce the provisions of a will, the petition not alleging any agreement between the testators to make a will and no proof being introduced on that point. The facts of the case were that a husband and wife had jointly executed a testamentary document, the following being declared at the beginning and being repeated at the

ending: "This and this only to be our last mutual and joint will."

The instrument also used the words "we give," "our property," and that it was to "be divided."

The majority of the court held that the instrument showed on its face an agreement to make a will and it was neither necessary to allege nor prove a contract, the execution of the instrument being sufficient. The minority dissented on the ground that such an agreement could only be found from the acts and circumstances surrounding the transaction and the mutual relationship of the parties, and that it could only be found as a fact, not as a matter of law. In the main and in the affirming opinions the words "This to be our last mutual and joint will" were held to indicate an understanding that neither of the testators would make any different disposition of his or her property; and that the words "we give" and "our property" indicated a joint purpose which was further borne out by the use of the words "to be divided" after the death of the sur-

lifetime and his death precluded him from receiving any reciprocal advantage under the will of the other. If the one who dies first has revoked his will, the survivor is not injured, for he has the like power of revocation. Injury could result only in those instances where the two parties die within a short time of each other.

§ 87. Equity Will Interpose Where Revocation Results in Fraud.

There are cases, however, where it would be a fraud for the survivor of two who had, pursuant to an agreement, made wills in favor of each other and certain third persons, to alter or revoke on his part the testamentary dispositions so mutually made, after the will of the other had become irrevocable through death. In such a case equity will step in to prevent fraud and will compel performance, viewing the matter as a contract rather than as a will.¹⁵ Equity, however, can deal only

vivor, no express words of devise or bequest being employed. On the final appeal, however, the court stated that the mere fact of two persons jointly executing a testamentary document wherein they made reciprocal dispositions in favor of each other may not in itself establish a contract, but that the language used in the instrument in question was sufficient for the purpose.

In *Keith v. Miller*, 174 Ill. 64, 51 N. E. 151, where a husband and wife made mutual wills, by two separate instruments, in favor of each other and their children, it was held that the execution of the documents could be shown as evidence of one transaction and

that they could be read and construed together as one instrument. Therefore, after the death of one, the mutual will signed by the survivor might be evidence in writing of a declaration of a trust or as evidence of a trust admitted in writing.

¹⁵ *Denyssen v. Mostert*, L. R. 4 P. C. 236; *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135; *Campbell v. Dunkelberger*, 172 Iowa 385, 153 N. W. 56; *Edson v. Parsons*, 85 Hun (N. Y.) 263, 32 N. Y. Supp. 1036, affirmed in 155 N. Y. 555, 50 N. E. 265; *Rastetter v. Hoenninger*, 151 App. Div. 853, 136 N. Y. Supp. 961, affirmed in 214 N. Y. 66, 108 N. E. 210; *Prince v. Prince*, 64 Wash. 552, 117 Pac. 255.

with the agreement, or interpose to prevent a wrong, but it has no jurisdiction over a will, that belonging peculiarly to the probate court.¹⁶

§ 88. Acceptance of Benefits: Revocation by Survivor a Fraud.

Where two parties have made mutual wills in favor of each other, whether pursuant to a valid agreement or not, if the survivor receives benefits under the will of the other who has died without having revoked the same and under the belief that the will of the survivor would not be altered, the revocation by the survivor of his will would be such a fraud as equity would prevent. Such wills are in effect the separate will of each maker and the right of revocation is undisputed except in those cases where it would be a fraud against the estate of the decedent to allow the survivor to receive a benefit or advantage under the will of the one first dying and thereafter to make a different disposition of his property. Where mutual or reciprocal wills have been made pursuant to an agreement which has been executed by one of the testators dying without having made any different testamentary disposition of this property, and the other has accepted the benefits accruing to him under the will of the deceased, the agreement becomes obligatory upon the survivor and may be enforced in equity against his estate.¹⁷

¹⁶ *Pemberton v. Pemberton*, 13 Ves. Jun. 290; *Jones v. Jones*, 3 Merivale 161.

¹⁷ *Denyssen v. Mostert*, L. R. 4 P. C. 236; *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135; *Bolman v. Overall*, 80 Ala. 451, 60 Am. Rep. 107; 2 So. 624; *Frazier v. Patterson*, 243 Ill. 80, 17 Ann.

Cas. 1003, 27 L. R. A. (N. S.) 508, 90 N. E. 216; *Baker v. Syfritt*, 147 Iowa 49, 125 N. W. 998; *Campbell v. Dunkelberger*, 172 Iowa 385, 153 N. W. 56; *White v. Winchester*, 124 Md. 518, Ann. Cas. 1916D 1156, 92 Atl. 1057; *Carmichael v. Carmichael*, 72 Mich. 76, 16 Am. St. Rep. 528, 1 L. R. A. 596, 40 N. W.

§ 89. Consolidation of Property for Purposes of a Will: Effect on Power of Revocation.

Two parties, such as a husband and wife, each owning separate property or having interests in joint property, may unite their separate estate or commingle their joint interests and join in the execution of a testamentary document for the purpose of disposing of all of the property of both. In such a case the facts may show that the parties came to a mutual understanding and that the making of the will by one was the inducement for the making of the will by the other. If one of the parties dies and the survivor accepts benefits under the will of the other, the power of revocation may be denied the survivor to the extent that equity will enforce the provisions of the will against the estate of the survivor and against

173; *Robertson v. Robertson*, 94 Miss. 645, 136 Am. St. Rep. 589, 47 So. 675; *Bower v. Daniel*, 198 Mo. 289, 95 S. W. 347; *Brown v. Webster*, 90 Neb. 591, 37 L. R. A. (N. S.) 1196, 134 N. W. 185; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773; *Deseumeur v. Rondel*, 76 N. J. Eq. 394, 74 Atl. 703; *Edson v. Parsons*, 85 Hun (N. Y.) 263, 32 N. Y. Supp. 1036; *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265; *Rastetter v. Hoenninger*, 214 N. Y. 66, 108 N. E. 210; *In re Davis' Will*, 120 N. C. 9, 58 Am. St. Rep. 771, 38 L. R. A. 289, 26 S. E. 636; *Turnipseed v. Sirrine*, 57 S. C. 559, 76 Am. St. Rep. 580, 35 S. E. 757; *Larrabee v. Porter* (Tex. Civ.), 166 S. W. 395; *Prince v. Prince*, 64 Wash. 552, 117 Pac. 255; *Allen v. Boomer*, 82 Wis. 364 52 N. W. 426.

See, also: *Izard v. Middleton*, 1 Desaus. (S. C.) 116 and note, where the old English cases have been collected.

A recent case has gone to rather extreme lengths in enforcing an oral agreement to will property. An aunt and a niece had orally agreed to make wills in favor of each other. The aunt made her will as agreed, but the niece died first without having performed her part of the agreement. The court said that if the aunt had died first, the niece would have received property under the aunt's will. The case was likened to that of a policy of life insurance which, had the aunt taken it out for the benefit of her niece, would have been an expense in the payment of premiums. It was held that the niece received practically

all who hold under him with notice of the provisions of the will or without value.¹⁸

§ 90. Secret Revocation May Result in Fraud.

Although there has been a consolidation of property interests by two parties for the purpose of mutually disposing of the same by last will and testament, or although two testators may have made mutual wills in favor of

the same benefits, the court saying: "It will not do to say that she (niece) received no benefit as the plaintiff (aunt) did not die, any more than it would lie in the mouth of a man who paid his premium of insurance with a note to say there was a failure of consideration, as he did not die, or his property was not burned." It was held that it would be a fraud upon the rights of the aunt to have allowed the niece to have received such benefits and for her estate not to account for the same; that the retention of the benefits by the niece would raise an implied agreement to compensate therefor and that resort might be had to the original contract to ascertain what compensation was contemplated by the parties; that even though the court could not make a will for the deceased niece, it could determine that the aunt was the equitable owner of the property.—*Turnipseed v. Sirrine*, 57 S. C. 559, 76 Am. St. Rep. 580, 35 S. E. 757.

The case of *Turnipseed v. Sirrine*, supra, questions *Izard v. Middleton*, 1 Desaus. (S. C.) 116, inti-

imating that the making of the will by the aunt was such part performance as would take the oral agreement out of the Statute of Frauds.

¹⁸ *Carmichael v. Carmichael*, 72 Mich. 76, 16 Am. St. Rep. 528, 1 L. R. A. 596, 40 N. W. 173; *Bower v. Daniel*, 198 Mo. 289, 95 S. W. 347.

In *Carmichael v. Carmichael*, 72 Mich. 76, 16 Am. St. Rep. 528, 1 L. R. A. 596, 40 N. W. 173, where a husband and wife had made mutual wills in favor of each other and their children upon an agreement as to a division of their property, it was held that after the death of the husband the wife could not change or revoke her will and transfer the property to certain children to the detriment of the others, contrary to the agreement, and that equity would specifically enforce the contract.

In *Deseumeur v. Rondel*, 76 N. J. Eq. 394, 74 Atl. 703, where a husband and wife jointly executed a single testamentary document disposing of their property for life and thereafter to certain heirs, which instrument declared in

each other pursuant to an agreement, yet either testator would have the right of revocation during their joint lives upon giving notice to the other. A will is by nature revocable and the giving of notice would prevent fraud. The right of revocation is absolute, but a secret revocation, in many instances, would be a fraud against the estate of the other. Whether or not it would result in fraud depends upon the particular circumstances of the case. If one party should revoke secretly and thereafter receive benefits under the will of the other, equity will specifically enforce the agreement.¹⁹

§ 91. Agreements to Make Mutual Wills May Be Written or Oral: Points Arising in Each Case.

The distinguishing feature of a will is that the testator may revoke it at any time, yet this right may be renounced. He may contract to make a will containing certain dispositions which shall not be altered or cancelled, and such agreement, if based upon a sufficient consideration, is valid and will be enforced in equity.

terms "it is our mutual will and intention that this disposition of our whole estate, real and personal, shall take effect upon the demise of the survivor of us," the husband died first and the wife having received benefits under the will, equity decreed specific performance of the agreement, although the wife subsequently remarried and made a new will revoking the former mutual will.

In *Allen v. Boomer*, 82 Wis. 364, 52 N. W. 426, where a husband and wife had executed similar wills pursuant to an agreement, although the will of the wife dis-

posed of property of the husband, yet she dying first and he having accepted benefits under it, the law having put him to the election of accepting its provisions, he was held bound by its terms. As to equity enforcing agreements to devise property, see, post, §§ 145, 146.

¹⁹ *Denyssen v. Mostert*, L. R. 4 P. C. 236; *Robinson v. Mandell*, Fed. Cas. No. 11959, 3 Cliff. 169; *Campbell v. Dunkelberger*, 172 Iowa 385, 153 N. W. 56; *Frazier v. Patterson*, 243 Ill. 80, 17 Ann. Cas. 1003, 27 L. R. A. (N. S.) 508, 90 N. E. 216; *Johnson v. Hubbell*,

A party may agree with another to will him his property in consideration of the other making a like testamentary disposition in his favor. Such an agreement might be in writing and could be expressed in two ways, either in a separate paper duly executed by the parties or it might be contained in the language of the wills. If the wills recite that they were made pursuant to an agreement, such statements are accepted as evidence of the fact,²⁰ or it could likewise be proven by the introduction of the written contract. Where the only consideration for the promise not to revoke a will is that another has agreed to do likewise, there could be no fraud perpetrated should one testator, before the death of the other, revoke his will after having given the other due notice of his intention. Where the agreement to make a will in a certain manner is based upon a sufficient consideration, such as services to be rendered and the like, a different situation arises which will be dealt with under contracts to make wills. But in those cases where two testators have made reciprocal dispositions in favor of each other pursuant to an oral agreement so to do, and one party has died and the survivor has accepted benefits under the will of the deceased, it then becomes a matter of importance as to the proof which is required to establish the fact of the oral contract so that it may be enforced.

10 N. J. Eq. 332, 66 Am. Dec. 773; Deseumeur v. Rondel, 76 N. J. Eq. 394, 74 Atl. 703; Edson v. Parsons, 85 Hun (N. Y.) 263, 32 N. Y. Supp. 1036; Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265; Rastetter v. Hoenninger, 151 App. Div. 853, 136 N. Y. Supp. 961, affirmed in 214 N. Y. 66, 108 N. E. 210; Rivers v. Rivers' Exrs., 3 Desaus. (S. C.)

190, 4 Am. Dec. 609; Larrabee v. Porter, (Tex. Civ.) 166 S. W. 395. See, also, Izard v. Middleton, 1 Desaus. (S. C.) 116, and note, where the old English cases on the subject have been collected.

²⁰ Jamison v. McCormick, 172 Iowa 666, 154 N. W. 898; Campbell v. Dunkelberger, 172 Iowa 385, 153 N. W. 56; Rastetter v. Hoenninger,

§ 92. Evidence Necessary to Establish an Oral Agreement to Execute Mutual Wills.

The burden of proof is upon the person seeking to establish the fact that a will was or should have been executed pursuant to a contract. Any oral agreement which would rob a will of its distinguishing feature, namely, irrevocability, should not be considered as established unless shown by the most clear and convincing legal proof that it was executed pursuant to a definite agreement and that the consideration was the execution of mutual or reciprocal wills. Oral contracts to will property are viewed with distrust. This subject is more fully dealt with under contracts to make wills.²¹ Evidence, however, of parol declarations and extrinsic circumstances may be admitted to show the agreement; the relationship of the parties and surrounding circumstances may likewise be considered. Declarations made at the time the wills were executed would be received as part of the *res gestæ*. Parol declarations, however, are not sufficient to establish the contract, but may be considered in

151 App. Div. 853, 136 N. Y. Supp. 961, affirmed in 214 N. Y. 66, 108 N. E. 210.

²¹ Price v. Wallace, 224 Fed. 576; Frazier v. Patterson, 243 Ill. 80, 17 Ann. Cas. 1003, 27 L. R. A. (N. S.) 508, 90 N. E. 216; Bevington v. Bevington, 133 Iowa 351, 12 Ann. Cas. 490, 9 L. R. A. (N. S.) 508, 110 N. W. 840; Boeck v. Milke, 141 Iowa 713, 118 N. W. 874, 120 N. W. 120; Campbell v. Dunkelberger, 172 Iowa 385, 153 N. W. 56; Stennett v. Stennett, (Iowa) 156 N. W. 406; Wanger v. Marr, 257 Mo. 482, 165 S. W. 1027; Sappingfield v. King, 49 Ore. 102, 109,

8 L. R. A. (N. S.) 1066, 89 Pac. 142, 90 Pac. 150; Herrick v. Snyder, 27 Misc. Rep. 462, 59 N. Y. Supp. 229; In re McMillan's Estate, 167 App. Div. 817, 153 N. Y. Supp. 400; Lasher v. McDermott, 91 Misc. Rep. 305, 154 N. Y. Supp. 798; Edson v. Parsons, 85 Hun (N. Y.) 263, 32 N. Y. Supp. 1036; Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265; Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118; Wallace v. Wallace, 216 N. Y. 28, 109 N. E. 872; Wilson v. Gordon, 73 S. C. 155, 160, 53 S. E. 79, 81; Prince v. Prince, 64 Wash. 552, 117 Pac. 255. As to oral contracts to will prop-

connection with surrounding circumstances.²² Of course positive testimony by disinterested witnesses who were present at the time the agreement was made and who heard and understood its conditions, if undisputed and in accord with the actions of the parties, would be sufficient.

§ 93. The Same Subject: Where Fraud Is an Issue.

The question of the mental capacity of one of the testators to make a will, or of fraud or undue influence in securing the agreement, may be involved. Evidence of the fact of an agreement to make mutual or reciprocal wills and of part performance of the same may properly be admitted in evidence in the probate court on the issue of testamentary capacity. All the circumstances surrounding the execution of a will have a bearing on its

erty being viewed with distrust, see, post, §§ 135, 137, 138.

²² Price v. Wallace, 224 Fed. 576; Rogers v. Schlotterback, 167 Cal. 35, 138 Pac. 728; Blanc v. Connor, 167 Cal. 719, 141 Pac. 217; Collar v. Patterson, 137 Ill. 403, 27 N. E. 604; Sloniger v. Sloniger, 161 Ill. 270, 43 N. E. 1111; Cessna v. Miller, 85 Iowa 725, 51 N. W. 50; Thompson v. Romack, (Iowa) 156 N. W. 310; Lacey v. Zeigler, 98 Neb. 380, 152 N. W. 792; Spraker v. Dow, 48 Hun (N. Y.) 619, 1 N. Y. Supp. 240; In re McMillan's Estate, 167 App. Div. 817, 153 N. Y. Supp. 400; Taylor v. Higgs, 202 N. Y. 65, 95 N. E. 30; Wallace v. Wallace, 216 N. Y. 28, 109 N. E. 872; Dyess v. Rowe, (Tex. Civ.) 177 S. W. 1001.

As to the admissibility of evidence of parol declarations and surrounding circumstances to show the nature of an instrument offered for probate, see, ante, §§ 51, 52, 53.

As to the admissibility of extrinsic evidence as affecting the question of revocation, see, ante, § 54.

As to the construction of joint wills being controlled by their contents, see, ante, §§ 78, 79.

As to the admissibility of extrinsic evidence to show whether or not the maker of a will intended it to be conditional, see, post, §§ 110, 111, 112.

As to the extent to which parol declarations of a testator may be

validity, and if not part of the *res gestæ* in connection with the due execution of the document, they are part of the *res gestæ* where the issue is raised of fraud or undue influence in procuring the execution of the will.²³

§ 94. Effect of Bad Faith in Failing to Make a Will as Agreed.

If two parties enter into an agreement to make mutual wills in favor of each other and such agreement is in a form to render it binding, although the contract may be enforced in equity by the survivor against the estate of the one failing to perform his part of the contract, yet if the one who dies first shall have made his will as agreed, bad faith on the part of the one surviving in having failed to perform his part of the contract does not affect the will of the first decedent.²⁴ This principle, however, must not be confounded with that governing cases where wills have been denied probate because of having been obtained through fraud or undue influence.

admitted to prove or disprove revocation, see, post, §§ 124, 125, 126.

As to the evidence necessary to prove a contract to make a will, see, post, §§ 136, 138, 139.

²³ In *re Sandberg's Will*, 75 Misc. Rep. 38, 134 N. Y. Supp. 869.

As to the admissibility of evidence of parol declarations and surrounding circumstances to show the nature of an instrument offered for probate, see, ante, §§ 51, 52, 53.

As to the admissibility of extrinsic evidence as affecting question of revocation, see, ante, § 54.

As to the construction of joint

wills being controlled by their contents, see, ante, §§ 78, 79.

As to the admissibility of extrinsic evidence to show whether or not the maker of a will intended it to be conditional, see, post, §§ 110, 111, 112.

As to the extent to which parol declarations of a testator may be admitted to prove or disprove revocation, see, post, §§ 124, 125, 126.

As to the evidence necessary to prove a contract to make a will, see, post, §§ 136, 138, 139.

²⁴ *Bynum v. Bynum*, 33 N. C. 632.

§ 95. Agreement That the Marriage of One Shall Revoke the Will of the Other Not Effectual.

The law prescribes the manner in which wills may be revoked. If two single persons execute mutual wills in favor of each other pursuant to an agreement not recited in the wills that they should not be effective if either of the parties should marry, the fact of the marriage of one of the testators would not be a revocation of the will of the unmarried one since the law contains no such provision for revoking wills. The marriage of one would relieve the other from any contractual obligation, if one existed, but would not revoke his will.²⁵ Thus, should two unmarried sisters, under age, execute mutual wills in favor of each other which are undoubtedly made pursuant to a family arrangement and not intended to be operative in the event of the marriage of either, although one of the sisters marries, the will of the other who dies unmarried and without having revoked the same, must be admitted to probate.²⁶

§ 96. Effect of Marriage and Birth of Issue on a Will Executed Pursuant to a Contract.

The rule in practically all jurisdictions is that the will of an unmarried person is revoked by a subsequent marriage and the birth of issue. In ordinary cases no complications could arise. Where two parties have made wills in favor of each other pursuant to an agreement, the marriage of one could be taken as notice to the other of revocation, should such other be living. But if one had died and the survivor had accepted benefits under the will of the deceased, it would seem to be as great a wrong to allow him to revoke his will by the act of marriage and the birth of issue—in many jurisdictions

²⁵ In *re Goldsticker's Will*, 123 App. Div. 474, 108 N. Y. Supp. 489. ²⁶ *Hinckley v. Simmons*, 4 Ves. Jun. 160.

marriage alone revokes the will—as to allow a revocation in the ordinary manner. In the latter instance, however, the act is personal; in the former the law acts as a matter of public policy; but the effect is the same.

§ 97. The Same Subject: Equity Will Not Enforce Unjust Agreements.

The law, however, can not prevent a man from revoking his will or utterly destroying it by burning or the like, and the law can not make a will for a decedent. It is the contract, however, which, if valid, is binding, and it is the contract which equity enforces irrespective of the existence of a will. If the law, therefore, as a matter of public policy causes the will of an unmarried person to be revoked by his subsequent marriage in order to protect his wife and possible issue, the party aggrieved, as in other cases, must resort to equity for relief, which should be granted or withheld according to the circumstances. Thus it might be inequitable to grant specific performance against the estate of a decedent who had agreed to will all of his property to another, the promisor having subsequently married and the wife having been in ignorance of the agreement. Equity will not enforce a contract where the result would be harsh or oppressive.²⁷ And since the law prescribes that wills are revoked by marriage or by marriage and the birth of issue, it may be said that all parties to a contract to make a will must have done so with the statute in view. However, all relief should not be denied to the promisee and he should have his right of action for the value of the services rendered or for moneys expended under and pursuant to the agreement.²⁸

²⁷ See, post, §§ 135, 137, 138.

²⁸ *Owens v. McNally*, 113 Cal. 444, 33 L. R. A. 369, 45 Pac. 710;

Sloniger v. Sloniger, 161 Ill. 270, 43 N. E. 1111. In the case last cited it was held that although a

§ 98. The Same Subject: Effect of the Acceptance of Benefits.

It has been held that if a survivor of two testators who had made reciprocal wills in favor of each other, had received benefits under the will of the other and then subsequently had died without having revoked his will, his will must stand despite the fact of a subsequent marriage. For instance, where a husband and wife jointly executed one testamentary document which provided, in terms, that the property willed was the joint property of both and was to go to the survivor for life and thereafter to designated parties, the husband having accepted benefits under the will of his wife and having died without revoking his will, his widow by a subsequent marriage could claim no rights in the property contrary to the provisions of the will.²⁹

In a comparatively recent case, however, the ruling was to the contrary, although the circumstances were different. A husband and wife had executed mutual wills in a single instrument. The wife died but her will was not offered for probate. The husband thereafter remarried. Upon his death the joint instrument was offered as his will and rejected, the court holding it had been revoked by his subsequent marriage.³⁰

§ 99. The Same Subject: Where the Agreement to Make Mutual Wills Appears on the Face of the Instrument.

Where a testamentary document is jointly executed by two parties and shows on its face that the property of both testators is treated together as one and the same, will made prior to marriage and pursuant to a contract was revoked by subsequent marriage and was therefore void as a will, yet it could be treated as an equitable contract.

²⁹ Baker v. Syfritt, 147 Iowa 49, 125 N. W. 998.

³⁰ In re Anderson's Estate, 14 Ariz. 502, 131 Pac. 975. See, also, Corker v. Corker, 87 Cal. 643, 25 Pac. 922; McAnnulty v. McAnnulty,

that the dispositions made are to be joint gifts, and that the intention of both is that the joint will should not become operative if either thereafter make a different will, the revocation of the will as to one of the testators by reason of his subsequent marriage and the birth of issue, especially if that party should die and leave a different will, would be sufficient cause for refusing to admit the instrument to probate as the will of the other, even though such testator should die without having revoked the same. Such matters, however, must appear on the face of the instrument which would show it to be, in effect, a conditional will executed under an arrangement which, having been violated by one, should not bind the other.³¹

§ 100. The Statute of Frauds as Affecting Oral Agreements to Make Mutual Wills of Real Property: Part Performance.

Oral agreements to devise real property are void unless there is such part performance as will take the case out of the statute of frauds. The situation is very similar to that of oral contracts to convey lands which are not affected because of part performance. If two parties verbally agree, each in consideration of the other doing likewise, to make their wills disposing of their property in a specified manner, and one dies leaving a will which complies with the contract and the survivor accepts benefits under it, non-compliance with the agreement by the survivor being a fraud, there has been such part performance as will take the case out of the statute of frauds.³²

120 Ill. 26, 60 Am. Rep. 552, 11 N. E. 397; Estate of Larsen, 18 S. D. 335, 5 Ann. Cas. 794, 100 N. W. 738.

³¹ Peoria Humane Soc. v. McMurtrie, 229 Ill. 519, 82 N. E. 319.

¹ Com. on Wills—8

³² Carmichael v. Carmichael, 72 Mich. 76, 16 Am. St. Rep. 528, 1 L. R. A. 596, 40 N. W. 173; Bird v. Pope, 73 Mich. 483, 41 N. W. 514; Kofka v. Rosicky, 41 Neb. 328, 43 Am. St. Rep. 685, 25

§ 101. The Same Subject: Does the Statute Refer to Ownership at Date of Agreement or at Time of Death?

A person may agree to will all the real and personal property owned by him at the time of his death. When the contract is made he may possess no realty or he may die owning none. The devise can not become effective until the death of the testator and can operate only on the property he then possesses. During his lifetime a testator has the full and free use and enjoyment of his possessions, together with the power of disposition. Therefore if the one first dying owned no real property at his death, it is difficult to see how the statute of frauds could invalidate the agreement.³³

L. R. A. 207, 59 N. W. 788; Best (Tex. Civ.) 166 S. W. 395. As to v. Gralapp, 69 Neb. 811, 5 Ann. the Statute of Frauds affecting Cas. 491, 96 N. W. 641, 99 N. W. contracts to devise or bequeath 837; Johnson v. Hubbell, 10 N. J. property, see, post, §§ 150, 151. Eq. 332, 66 Am. Dec. 773; Adams 33 Turnipseed v. Sirrine, 57 S. C. v. Swift, 169 App. Div. 802, 155 559, 76 Am. St. Rep. 580, 35 S. E. N. Y. Supp. 873; Turnipseed v. Sir- 757.
rine, 57 S. C. 559, 76 Am. St. Rep. As to the Statute of Frauds af- 580, 35 S. E. 757; League v. Davis, fecting contracts to will property, 53 Tex. 9; Larrabee v. Porter, see, post, §§ 150, 151.

CHAPTER V.

CONDITIONAL OR CONTINGENT WILLS.

- § 102. Definition of a conditional or contingent will.
- § 103. Matters to be considered when conditional wills are offered for probate.
- § 104. Wills are not declared conditional if they can reasonably be construed otherwise.
- § 105. The making of a will signifies that the testator did not intend to die intestate.
- § 106. The circumstances which can be considered in construing conditional wills.
- § 107. The same subject: Effect of failure to limit the contingency; the reasonableness thereof.
- § 108. The same subject: Nature of the bequests as indicating intention.
- § 109. The intention of the maker must be expressed; courts can not supply omissions.
- § 110. Extrinsic evidence not admissible to show whether maker intended will to be conditional.
- § 111. Effect of the Statute of Wills regarding the admission of evidence to show intent.
- § 112. Evidence of parol declarations or conduct of the maker not admissible to show intent.
- § 113. Courts can not qualify plain and unambiguous language.
- § 114. Wills effective at the election of a third person.
- § 115. "Alternative" wills.

§ 102. Definition of a Conditional or Contingent Will.

A conditional will, sometimes referred to as a contingent will, is one which, by its terms, becomes effective only upon the happening or not happening of some contingency, which contingency may be a date or period of time, an event, a set of circumstances, or a combination of these. If the contingency does not arise, the will never becomes operative. There is no principle of law which prevents a testator from making a will which will become effective only in the event of some contingency. The appointment of an executor may be made conditional; the same rule applies to bequests and devises; and there is no reason why a condition may not apply to the entire instrument as well as to a single provision. Whether or not the contingency has arisen is to be ascertained when the will is offered for probate.¹

§ 103. Matters to Be Considered When Conditional Wills Are Offered for Probate.

When an instrument is offered for probate, it is the first duty of the Court to ascertain the nature of the document and to determine whether or not it can be declared a will.² If the document is testamentary, the

¹ Goods of Porter, L. R. 2 P. & D. 22; Damon v. Damon, 8 Allen (Mass.) 192; Ex parte Lindsay, 2 Bradf. (N. Y.) 204.

² In the following cases it was held that the contingencies expressed in the wills in question affected the entire instruments and, the effectiveness of the wills being dependent upon certain conditions which did not arise, the wills were conditional and void: "I make this my last will

and testament (that is, in case my last will, before this wrote in my own hand, and witnessed by John Way and others, should be by any of my relations disputed), as follows:" etc.—Ingram v. Strong, 2 Phillim. 294. Sir John Nicholl, in deciding the foregoing case, said it was clear that the deceased intended to die testate and that the clause above named could not be held to be the reason for a new distribution, but was inserted as

Court must then find whether it is an absolute and unconditional disposition of the estate of the testator, or whether it can be accepted as a will only on the happening or not happening of a certain event; in other

a condition, and that it was only to be called into operation in case the former will was disputed. A letter written by a testator to his wife, while on his way from Liverpool to Ireland, respecting several family matters, then proceeded as follows: "I mention these matters thus particularly to serve as a memorandum for you in case it should be the Lord's will to call me hence by any fatal event in the voyage or journey before us, and for the same reason will add the following of my worldly goods not directed in our marriage settlement: viz.," etc.—*Goods of Ward*, 4 Hagg. 179. "I, Charles De Lanoe, . . . do make and appoint this my last will and testament, in manner following: i. e. Imprimis, In case I should die before I return from the journey I intend, God willing, shortly to undertake for Ireland, my will and desire is, That my house and lands at Farley Hill, and all the furniture and appurtenances thereto belonging, be all sold after my decease," etc. Then followed in the will certain bequests which were stated to be paid out of the moneys arising from the aforesaid sale.—*Parsons v. Lanoe*, 1 Ves. Sen. 189; s. c., *Ambl.* 557. In the foregoing case Lord Hardwicke held that the legacies depended on the sale

being made and that the sale being allowed only on a condition precedent which had failed, the whole instrument must fail. To the same effect see *Jacks v. Henderson*, 1 Desaus. (S. C.) 543. "In case I die before I join my beloved wife," etc. The testator was in the West Indies, separated from his wife, and was going on a voyage to England. That voyage did not, however, take place. Subsequently he rejoined his wife and they went to England together. Probate was refused, the court holding that the contingency referred to his joining his wife after the anticipated voyage to England and not to the fact that he rejoined her without taking this voyage.—*Sinclair v. Hone*, 6 Ves. Jun. 607. "I being on the eve of embarking for San Francisco, South America, or Mexico, do hereby, in case of my decease during my absence being fully ascertained and proved," etc. Probate was denied, although the testator, after his safe return, several times declared that he intended his will to stand.—*Goods of Winn*, 2 Sw. & Tr. 147. In this case, *Parsons v. Lanoe*, 1 Ves. Sen. 189, and *Strauss v. Schmidt*, 3 Phillim. 209, are reviewed and distinguished. "This is to certify, I, Robert Roberts, Master Mariner, do leave in pos-

words, whether or not it is a conditional will. When contingencies are expressed in a testamentary document presented for probate, the Court must then determine the intention of the testator and find whether the validity of

session two bank-books to my wife, named Emma Roberts; should anything happen to me on my passage to Wales, or during my stay, I leave my goods," etc.—*Roberts v. Roberts*, 2 Sw. & Tr. 337. "Being obliged to leave England to join my regiment in China, and not having time to make a will, I leave this paper containing my wishes and desires. Should anything unfortunately happen to me while abroad I wish everything that I may be in possession of at that time," etc.—*Goods of Porter*, L. R. 2 P. & D. 22. In the foregoing case Lord Penzance, in holding the will conditional, after referring to certain cases in which the probability of death had been held to have been expressed only as a reason for the making of the wills, said: "The question then is, whether the paper before me comes within the principle of these cases. I think it does not. If it had stopped at the end of the first sentence, I think it would have come within it. 'Being obliged to leave England to join my regiment . . . Should anything unfortunately happen to me whilst abroad'; but the testator goes on to say, 'I wish everything that I may be in possession of at that time, to be divided,' etc. At what time? His death whilst abroad;

and every disposition he speaks of, is to take effect only at the time of his death abroad. It is said that the following words, 'or anything appertaining to me thereafter,' enlarges the operation of the will. I do not think so. The testator's meaning is, 'everything I have in my possession at the time of my death abroad,' is to be disposed of in a certain way; and furthermore, 'anything that may come to me after my death,' that is, any reversionary interest. 'At that time' limits the disposing part of the will to the period of time during which a certain event might happen, namely, his death abroad."—*Goods of Porter*, supra. "This is the last will and testament of me, G. T. R., that in case anything should happen to me during the remainder of the voyage from hence to Sicily and back to London, that I give," etc.—*Goods of Robinson*, L. R. 2 P. & D. 171. A mariner's will read: "Instructions to be followed if I die at sea or abroad." The testator died while on shore, on a visit with his wife. The court held that assuming the will had been made at sea, it was clearly conditional, if the heading controlled.—*Lindsay v. Lindsay*, L. R. 2 P. & D. 459. "I, J. W. D., . . . being in sound mind and body, and being about

the will was made dependent upon such conditions, or whether the maker was simply expressing the reasons why he executed the instrument. If, according to the language of the will, a condition is clearly imposed, it

to go to Cuba, and knowing the dangers of voyages, do hereby make this as my last will and testament," etc. Then followed particular dispositions, the first reading: "First, If by any casualty or otherwise I should lose my life during this voyage, I give and bequeath to my wife Ann," etc. It was held that the second portion above quoted attached to and qualified the particular bequest.—*Damon v. Damon*, 8 Allen (Mass.) 192. Hoar, J., in rendering the decision, said: "He gives a certain piece of property to his wife, if he loses his life during the voyage. There is no gift to her without that qualification. Suppose any other condition had been expressed—'If I die before I reach a certain age,' or 'before a certain house is finished,' or 'if the legatee survives A,' could it be doubted that it would mean the bequest was conditional?" In the foregoing case it was held that the condition attached only to the particular bequest and not to the entire instrument, and that therefore the will should be admitted to probate. Compare *Parsons v. Lanoe*, 1 Ves. Sen. 189; s. c., *Ambl.* 557. A testator escaped from a shipwreck in the Mississippi river and wrote his will, referring to his peril, and said: "If I never get

back home, I leave you everything," etc. He subsequently returned home. It was held that the contingency applied to the whole will.—*Maxwell v. Maxwell*, 3 Metc. (Ky.) 101. "As I intend starting in a few days to the State of Missouri, and should anything happen that I should not return alive, my wish," etc. The will was held conditional, as it referred to a special trip and a special time.—*Dougherty v. Dougherty*, 4 Metc. (Ky.) 25. The will of a soldier read: "If I never return home I want all I have to be my wife's." The testator at the time of making the will was in the army. It was held that his safe return to his home caused the will to be void.—*Magee v. McNeil*, 41 Miss. 17, 90 Am. Dec. 354. "I this day start for Kentucky; I may never get back. If it should be my misfortune, I give all my property," etc. It was held that the visit to Kentucky was not named merely as the occasion for making the will or that its supposed risks reminded him of the propriety of such an act, but that his death prior to his return was a condition upon which the will depended for its efficacy.—*Robnett v. Ashlock*, 49 Mo. 171. A will written by an illiterate person contained this provision: "If I should not get

must then be determined whether the condition applies to the entire instrument or only to certain bequests or devises. A determination of these points is necessary whenever a testamentary document containing conditions is presented for probate.

back do as I say." The testator contracted an illness on his trip, returned home, but died shortly afterwards. Probate of the document was refused.—*Morrow's Appeal*, 116 Pa. St. 440, 2 Am. St. Rep. 616, 9 Atl. 660. "Let all men know hereby, if I get drowned this morning, Mch. 7, 1872, that I bequeath all my property," etc.—*French v. French*, 14 W. Va. 459.

The following are cases of wills held to be not conditional, the language used having been determined to have been stated merely as the occasion for making the will. Such wills were admitted to probate although the particular contingencies mentioned did not arise. "In case of accident I sign this my last will."—*Bateman v. Pennington*, 3 Moore P. C. C. 223. "To take effect only in event of my son Charles dying under the age of twenty-one years and my daughter Sarah dying under that age and unmarried," etc.—*Goods of Cooper*, Dea. & Sw. 9. "In case of my inability to make a regular codicil to my will, made and published on the 2d of May, 1820, I desire the following to be taken as a codicil to, and as further part of said will."—*Forbes v. Gordon*, 3 Phillim. 614. "Lest I should die before the next sun I make this

my last will and testament," etc.—*Burton v. Collingwood*, 4 Hagg. 176. "In the prospect of a long journey, should God not permit me to return to my home, I make this my last will."—*Goods of Cawthron*, 3 Sw. & Tr. 417. "I request that in the event of my death while serving in this horrid climate, or any accident happening to me," etc.—*Goods of Thorne*, 4 Sw. & Tr. 36. "On leaving this station for Thargomindah and Melbourne, in case of my death on the way, know all men this is a memorandum of my last will and testament."—*Goods of Mayd*, L. R. 6 Prob. Div. 17. "In case of any fatal accident happening to me, being about to travel by railway, I hereby leave," etc.—*Goods of Dobson*, L. R. 1 P. & D. 88. "I,, being at this date of sound mind . . . but physically weak in health, having, at my own free will and desire, obtained permission . . . to cease all duty for a few days, and I wish, during such time, to be removed from Appellina to floating hospital ship Berwick Walls, in order to recruit my health . . . and in event of my death occurring," etc.—*Goods of Martin*, L. R. 1 P. & D. 380. "If anything happens to us on the way, my will has been accidentally

§ 104. Wills Are Not Declared Conditional if They Can Reasonably Be Construed Otherwise.

If the validity of a will, by terms expressed therein, is made to depend upon the happening or not happening of some certain event and the contingency has not arisen,

packed away in a tin box to which I can not get access, as I forget which box it has been put into. However, if we both come to grief, I appoint you my executor; if I only, then in conjunction with Nan." The foregoing was in a letter, good under the Scots law, sent by a Scotchman who was about to sail with his wife from Calcutta to England. The court specially referred to the fact that no period of time was mentioned when the will was to become operative. It was held not conditional.—*Halford v. Halford*, (1897) P. 36. "If anything should happen to me while in India that all moneys, documents, properties or securities belonging to me or any moneys due to me or owing to me at the time of my death," etc. The court held the last words above quoted referred only to a general disposition of property.—*Estate of Vines* (1910), P. 147. In the foregoing case the court gave the following illustration: "If a man write 'should I die tomorrow, my will is' so and so, his death must occur to make the document operative; whereas if he write 'lest I die tomorrow,' it will be operative whether he die or not on the morrow."—*Estate of Vines*, *supra*. "Being about to take a long jour-

ney and knowing the uncertainty of life, think it advisable to make some disposition of my estate, do make this my last will and testament," etc.—*Tarver v. Tarver*, 9 Pet. (U. S.) 174, 9 L. Ed. 91. "If any accident should happen to me that I die from my home, my wife, J. A. L., shall have everything that I possess."—*Likefield v. Likefield*, 82 Ky. 589, 56 Am. Rep. 908. "Realizing the uncertainty of life at all times and the dangers incident to travel, I leave this as a memorandum of my wishes, should anything happen to me during my intended trip to Buffalo and other places."—*Redhead v. Redhead*, 83 Miss. 141, 35 So. 761. An olographic will in the form of a letter referring to sickness of the maker contained the following expressions: "If I die," a request "to answer at once," and also the statement "This is private." It was held such expressions did not alter the nature of the paper as the request to answer might have been for the sake of information as to whether the letter had been received and the last expression might well have been a mere request that it was not to be made public until after the death of the sender.—*Buffington v. Thomas*, 84 Miss. 157. "According to my pres-

the instrument must be denied probate. If, however, the condition applies merely to certain provisions of the will and is of partial application only, the will should be admitted and the question as to the effect of the contingency be left to future construction.³ Should there be a reasonable doubt as to the effect of the condition named, that is, whether it affects the entire instrument or only certain provisions thereof, the best procedure is to admit

ent intention, should anything happen to me before I reach my friends in St. Louis, I wish to make a correct disposition of the Three hundred dollars in the hands of Mr. H. bearing interest for me. Of this I leave," etc.—*Ex parte Lindsay*, 2 *Bradf.* (N. Y.) 204. A will contained a single legacy, with this condition: "This gift and bequest being subject to the following condition, viz.: that said M. B. shall produce from the officers of the ship in which I shall sail on my next cruise, satisfactory evidence of my decease during the same." The court held that the word "condition" should be construed in relation to the particular subject to which it referred and not to the will generally, and that as the testator did not die during the cruise referred to, no evidence was required of his death while on such cruise. It was held that the condition was not annexed to the substance of the gift, but only to a collateral matter, and that the gift was absolute and not conditional, and that such a condition could operate only on the contingency contemplated by

the express language of the bequest. The event contemplated never having occurred, it was held that the gift should not be disturbed.—*Thompson v. Connor*, 3 *Bradf.* (N. Y.) 366. A will referred to a journey and used the following expressions: "Knowing the uncertainty of life," and "should anything befall me while away or should I die, then and in that event," etc.—*Forquer's Estate*, 216 *Pa. St.* 331, 8 *Ann. Cas.* 1146, 66 *Atl.* 92. "Lewinsville, August 19, 1862, Dear Wife—I am going away; I may never return. I leave my property," etc.—*Cody v. Conly*, 27 *Gratt.* (Va.) 313.

³ *Damon v. Damon*, 8 *Allen* (Mass.) 192; *Thompson v. Connor*, 3 *Bradf.* (N. Y.) 366. Compare *Parsons v. Lance*, 1 *Ves. Sen.* 189; *s. c.*, *Ambl.* 557, where the condition expressed in the will referred only to a sale of the property of the testator, but as the bequests made were to be paid only out of the proceeds of such sale, the sale being prevented by the condition, the bequest necessarily failed. See, also, *Jacks v. Henderson*, 1 *Desaus.* (S. C.) 543.

such a will to probate and thereafter interpret its terms; otherwise, except after further litigation, such provisions of the will could not be construed. But when the conditions are general and the question arises as to the validity of the will as a whole, the matter must be determined when the will is presented for probate, for it is then a question as to whether or not the document should take effect as a last will and testament.⁴

§ 105. The Making of a Will Signifies That the Testator Did Not Intend to Die Intestate.

The fact that a testator makes a will implies generally that he did not intend to die intestate, and a will containing a condition should not be refused probate unless it clearly appears that the testator intended that it should not take effect except upon the prescribed contingency. A testament will not be decreed to be conditional if it can be reasonably held that the contingency was stated merely as the occasion for the making of the will, no matter if the language used, if strictly construed, be inaccurate for such purpose. Unless the words clearly show that the instrument was merely temporary or to become effective only on the happening or not happening of some contingent event, it will be admitted to probate.⁵

§ 106. The Circumstances Which Can Be Considered in Construing Conditional Wills.

A testator may set forth a contingency in his will in language so ambiguous that there is difficulty in determining whether he meant to refer to some possible event

⁴ Ex parte Lindsay, 2 Bradf. Likefield v. Likefield, 82 Ky. 589, (N. Y.) 204. 56 Am. Rep. 908; Damon v. Da-

⁵ Goods of Porter, L. R. 2 P. 411; Damon, 8 Allen (Mass.) 192; Ex & D. 22; Eaton v. Brown, 193 U. S. 411, 48 L. Ed. 730, 24 Sup. Ct. 489; Ex parte Lindsay, 2 Bradf. (N. Y.) 204; Thompson v. Connor, 3 Bradf.

as the inducement which caused him to make his will, or whether he intended that his will should become operative only in the event of the contingency. If the intention is clearly expressed that the will is to become operative only on the happening or not happening of a particular event, the will is conditional and must be so determined. If the effect of the language is that the testator, by reason of certain conditions mentioned, for instance, the uncertainty of life in general, was led to make his will, the will is not conditional. In determining the character of the instrument, the language of the entire document, with surrounding circumstances, may be considered. The Court may look to see if the dispositions made by the testator are related in any way to the time or the circumstances of the contingency. If the condition mentioned refers to some contemplated future event when the life of the testator might be in danger, there appears no reason why the contingency should be mentioned unless it was intended to make the will conditional. If, on the other hand, the testator is in imminent danger and mentions the fact in his testament, it might readily be supposed that the condition mentioned was the inducement for the making of the will.^c

§ 107. The Same Subject: Effect of Failure to Limit the Contingency. The Reasonableness Thereof.

In determining the effect of a contingency expressed in a will, it should be ascertained whether the condition is confined to a particular time or to a particular event.

(N. Y.) 366; *Cody v. Conly*, 27 Gratt. (Va.) 313; *French v. French*, 14 W. Va. 459.

^c A letter, testamentary in effect, from a military officer to his sis-

ter, containing the following language, was held to be not conditional, viz.: "If I remain here taking pabs for some time to come the chances are in favor of

For instance, if the will does not specify a particular length of time or a particular period when it is to be operative or inoperative, or specifies that it is made conditional upon the return from some journey without specifying any particular journey, then it is general in character and is construed as being only the expression of the inducement or reason why the testator made the will.⁷ And in construing conditions it is proper for the Court to consider whether or not they are reasonable; this consideration, however, is only for the purpose of construing ambiguous language in a will in order to determine the reason for its expression by the testator, for if the language is clear and unambiguous and expresses a condition affecting the validity of the entire instrument, the clear words of the document must and do control.

§ 108. The Same Subject: Nature of the Bequests as Indicating Intention.

The nature of the bequests or devises set forth in a will may indicate to an extent the intention of the testator in expressing a condition; thus if the condition was that the testator and his wife should die at one and the same time and by the same accident, if the maker's intention was that the will should not become operative except in the event of the contingency named, no bequest or devise would be made in favor of his wife, for under the condition named she would not then be living to receive

more of us being killed, and as I may not have another opportunity of saying what I wish to be done with any little money I may possess in case of accident I wish to make everything I possess over to you. . . . Now keep this till

I ask you for it."—Goods of Spratt (1897), P. 28.

⁷ Goods of Spratt, (1897) P. 28; Halford v. Halford, (1897) P. 36; Estate of Vines, (1910) P. 147; Buffington v. Thomas, 84 Miss. 157, 105 Am. St. Rep. 423, 36 So. 1039.

it.⁸ Likewise, the likelihood of conditions under ordinary circumstances being attached to gifts made by last will may be considered by the Court in determining the intention of the maker. Isolated words may be modified and controlled by the intention of the testator to be gathered from the whole instrument.⁹

§ 109. The Intention of the Maker Must Be Expressed; Courts Can Not Supply Omissions.

No matter how strongly it may be supposed a testator intended to have his will become effective only upon the happening of some event, yet an unexpressed intention can not be enforced. Such an intention must be clearly expressed, for a will should not be declared conditional merely because there is some slight indication that it was so intended. The question to be determined is the intention of the testator expressed in the document and all other rules are subordinate to it. It is a well settled rule of construction that if the testator fails to mention some particular event, which, had it occurred to him he undoubtedly would have made provision against, the omission can not be supplied by the Courts, otherwise

⁸ In *Goods of Hugo*, L. R. 2 Prob. Div. 73, the joint will of a husband and wife contained this provision: "This is the last will and testament of us . . . in case we should be called out of this world at one and the same time and by one and the same accident," etc. The will also had a clause revoking former wills. The contingency not arising, the will was held conditional, therefore it was held ineffective and did not revoke the former wills.

⁹ *Eaton v. Brown*, 193 U. S. 411, 48 L. Ed. 730, 24 Sup. Ct. 489; *Likefield v. Likefield*, 82 Ky. 589, 56 Am. Rep. 908.

"In the construction of wills, if the language of the testator is such that it may be construed in two different senses, one of which would render the disposition made of the property illegal and void, and the other would render it valid, the court should give that construction to his language which will make the disposition of the

they would not be construing wills, but rather would be making them.¹⁰

§ 110. Extrinsic Evidence Not Admissible to Show Whether Maker Intended Will to Be Conditional.

In determining the question as to whether the contingency mentioned in a will was the cause which led the testator to make it or whether he intended it as a condition precedent to the will becoming effective, grave danger would arise if the Court went beyond the literal and grammatical meaning of the words expressed and substituted its own imagination for what it might believe the testator would have said had his attention been called to certain facts.¹¹ Extrinsic evidence should not be allowed to explain the intention of the testator. There is an exception to this rule in a case where the ambiguity arises because of extrinsic circumstances, in

property effectual."—*Butler v. Butler*, 3 Barb. Ch. (N. Y.) 304; *Griffin v. Ford*, 1 Bosw. 123.

¹⁰ *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315; *Gibson v. Seymour*, 102 Ind. 485, 52 Am. Rep. 688, 2 N. E. 305; *Augustus v. Seabolt*, 3 Metc. (Ky.) 155; *Rupp v. Eberly*, 79 Pa. St. 141; *Sponsler's Appeal*, 107 Pa. 95; *Morrow's Appeal*, 116 Pa. St. 440, 2 Am. St. Rep. 616, 9 Atl. 660; *Green's Estate*, 140 Pa. 253, 21 Atl. 317; *McCall v. McCall*, 161 Pa. 412, 29 Atl. 63; *Stevens's Estate*, 164 Pa. 209, 31 Atl. 243; *Yearnshaw's Appeal*, 25 Wis. 21.

¹¹ *Eaton v. Brown*, 193 U. S. 411, 48 L. Ed. 730, 24 Sup. Ct. 489.

As to the admissibility of evidence of parol declarations and

surrounding circumstances to show the nature of an instrument offered for probate, see, ante, §§ 51, 52, 53.

As to the admissibility of extrinsic evidence as affecting the question of revocation, see, ante, § 54.

As to the construction of joint wills being controlled by their contents, see, ante, §§ 78, 79.

As to the evidence necessary to establish agreements to execute mutual or reciprocal wills, see, ante, §§ 92, 93.

As to the extent to which parol declarations of a testator may be admitted to prove or disprove revocation, see, post, §§ 124, 125, 126.

As to the evidence necessary to prove a contract to make a will, see, post, §§ 136, 138, 139.

which case parol evidence is admitted from necessity. If the language of the will should grant a bequest to a person or an institution and more than one person or institution answers to the description, or where it is not clear as to the subject matter to which the language of the will was intended to apply, evidence of extrinsic circumstances may be properly admitted in order that the Court may determine the intention of the testator.¹²

§ 111. Effect of the Statute of Wills Regarding the Admission of Evidence to Show Intent.

Prior to the Statute of Wills, 1 Victoria, ch. 26 (1837), which abolished the distinction between wills of personalty and wills of realty, parol evidence was admitted to show whether a testator intended a condition expressed in a will bequeathing personal property to prevent it from becoming operative except in the event of the contingency named, and also for the purpose of showing a parol re-execution and ratification of the instrument. Thus declarations of a testator made subsequent to the execution of the will were admitted to prove the character of a will of personal property. For instance, if the condition expressed in the will was "if I should die on my journey from England to America," evidence was admitted of oral declarations made by the testator after his safe return from such a journey to the effect that the will previously made was still his will and that he wished it to stand. Evidence was also formerly admitted to the effect that the testator had carefully retained the custody

¹² Fourquer's Estate, 216 Pa. St. 331, 8 Ann. Cas. 1146, 66 Atl. 92. In Kelleher v. Kernan, 60 Md. 440, proof regarding the testator's purpose and efforts to provide for his

beneficiary in anticipation of his trip was received in evidence for the purpose of determining whether that condition of mind existed which the law regards as

of the will long after the contingency therein expressed had been impossible of fulfillment. The idea at that time was that a conditional will of personal property could be converted into an absolute will by a subsequent act of ratification or re-execution.¹³ Wills of real property, however, were effected by the Statute of Frauds, which required a writing. The principle was stated in the early case of *Parsons v. Lanoe*, 1 Ves. Sen. 189; s. c. *Ambl.* 557, wherein Lord Hardwicke said: "The penning of the will then being so (conditional), collateral or parol proof, can not be taken into consideration, which would be dangerous, and what the Court, since the Statute of Frauds, is not warranted to do; for nothing will set it up but some act done by him after that event to republish the will or defeat the conditions."

§ 112. Evidence of Parol Declarations or Conduct of the Maker Not Admissible to Show Intent.

Since the Statute of Wills parol evidence of continued recognition is not admissible to convert a conditional will into an absolute will so as to pass either real or personal property. A will is the lawful intent of its maker; he can not delegate to another the right to make his

testamentary, in a case where it could not be said that the instrument was a deed or a will.

13 *Ingram v. Strong*, 2 Phillim. 294; *Strauss v. Schmidt*, 3 Phillim. 209; *Forbes v. Gordon*, 3 Phillim. 614; *Burton v. Collingwood*, 4 Hagg. 176; *Goods of Winn*, 2 Sw. & Tr. 147; *Goods of Ward*, 4 Hagg. 179; *Allan v. Vanmeter's Devisees*, 1 Metc. (Ky.) 264.

As to the admissibility of evidence of parol declarations and surrounding circumstances to show

the nature of an instrument offered for probate, see, ante, §§ 51, 52, 53.

As to the admissibility of extrinsic evidence as affecting the question of revocation, see, ante, § 54.

As to the construction of joint wills being controlled by their contents, see, ante, §§ 78, 79.

As to the evidence necessary to establish agreements to execute mutual or reciprocal wills, see, ante, §§ 92, 93.

As to the extent to which parol

will for him nor can he leave to another the power to revoke his will after his death. The Statute of Wills in England and the statutes of the various states prescribe the formalities necessary to make a will and also prescribe the manner in which it may be revoked. The rule now is well settled that parol declarations of the testator can not be admitted to control the construction of a will except when the terms used in the will apply indifferently and without ambiguity to each of several different subjects or persons, in which case such evidence may be received for the purpose only of determining which of the persons or subjects so described was intended by the testator.¹⁴ Nor can collateral proof, such as retaining custody of a will, be taken into consideration in determining whether a will is conditional or not. Proof of re-execution or republication of the will would be admissible if performed and proved as required by statute, being the same as the original execution of a will, but no will should be supported by parol proof as against the Statute of Frauds and the Statute of Wills.¹⁵

declarations of a testator may be admitted to prove or disprove revocation, see, post, §§ 124, 125, 126.

As to the evidence necessary to prove a contract to make a will, see, post, §§ 136, 138, 139.

¹⁴ *Wooton v. Redd's Exr.*, 12 Gratt. (Va.) 196; *Boylan v. Meeker*, 28 N. J. L. 274; *Skipwith v. Cabell's Exr.*, 19 Gratt. (Va.) 758; *Stevens v. Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13412.

As to the admissibility of evidence of parol declarations and surrounding circumstances to show the nature of an instrument offered for probate, see, ante, §§ 51, 52, 53.

As to the admissibility of ex-

trinsic evidence as affecting the question of revocation, see, ante, § 54.

As to the construction of joint wills being controlled by their contents, see, ante, §§ 78, 79.

As to the evidence necessary to establish agreements to execute mutual or reciprocal wills, see, ante, §§ 92, 93.

As to the extent to which parol declarations of a testator may be admitted to prove or disprove revocation, see, post, §§ 124, 125, 126.

As to the evidence necessary to prove a contract to make a will, see, post, §§ 136, 138, 139.

¹⁵ *Goods of Winn*, 2 Sw. & Tr.

§ 113. Courts Can Not Qualify Plain and Unambiguous Language.

If the language of a will is plain and its meaning is obvious, the Court has no right to qualify or control such language in any way by conjecture or doubt arising from extraneous facts. If the testament is contingent in form, although the testator through inadvertence failed to express his intention as he undoubtedly would have done had his attention been called to the matter, it must be so declared, for the Court can no more make a will in part for a deceased person than it can make his whole will. In a proper case, evidence of circumstances surrounding the testator at the time he made his will may be admitted for the purpose of putting the Court as nearly as pos-

147; *Roberts v. Roberts*, 2 Sw. & Tr. 337; *In re Robinson*, L. R. 2 P. & D. 171; *Maxwell v. Maxwell*, 3 Metc. (Ky.) 101; *Dougherty v. Dougherty*, 4 Metc. (Ky.) 25; *Maggee v. McNeil*, 41 Miss. 17, 90 Am. Dec. 354; *Sewell v. Slingluff*, 57 Md. 537; *Robnett v. Ashlock*, 49 Mo. 171; *Ex parte Lindsay*, 2 Bradf. (N. Y.) 204; *Wooton v. Redd's Exr.*, 12 Gratt. (Va.) 196. See, also, *French v. French*, 14 W. Va. 460.

In *Sewell v. Slingluff*, 57 Md. 537, the court said: "To allow parol declarations of a testator, either made before or after the execution of the will, to render it inoperative at some future time and in the event of some future contingency, would be to allow a parol revocation of it." In this case parol evidence was not admitted to prove that the will, valid

on its face and without conditions, was in fact executed only to have effect in the event the testatrix died without children. An attempt was made to prove the will had been deposited in escrow. The court held that in this respect wills differed from deeds, contracts, etc., which required the consent of two persons, and one person could withhold his consent. Wills, however, required only one person and no delivery was necessary. The testator could change his will at his pleasure. It would be idle to make an escrow of a will and would allow an unprincipled custodian to make or unmake a will by parol. If, however, there was a lack of *animus testandi*, such as where an instrument in the form of a will was drawn up as a joke, parol evidence may be admitted to prove such fact.

sible in the place of the testator at the time the will was executed, but such evidence can not be allowed for the purpose of effecting the construction of a will where the language is clear and unambiguous. In determining the intention of a testator as written in his will, the Court should not be governed or even aided by his subsequent declarations. Such a procedure would be dangerous, as there might be injected into a will an intention which the testator never had; it would be a departure from the strictness of the rule which requires all wills to be in writing; and the meaning of the language of the will might thus be made to depend, in some degree, not on the intention of the testator at the time the will was executed, but on what he had afterwards said about it under circumstances in which no testamentary import could be predicated on his words.¹⁶

§ 114. Wills Effective at the Election of a Third Person.

In a modern English case it was held that the object of a testator who sought to make a codicil to his will operative or not according to the determination of his wife after his death, was not illegal. The codicil concluded with this provision: "I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary." Lord Penzance, in rendering the opinion,

See *Lister v. Smith*, 3 Sw. & Tr. 282; *Nichols v. Nichols*, 2 Phillim. 180.

¹⁶ *Goods of Winn*, 2 Sw. & Tr. 147; *Roberts v. Roberts*, 2 Sw. & Tr. 337; *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315; *Maxwell v. Maxwell*, 3 Metc. (Ky.) 101; *Dougherty v. Dougherty*, 4 Metc. (Ky.) 25; *Sewell v. Slingluff*, 57

Md. 537; *Ex parte Lindsay*, 2 Bradf. (N. Y.) 204; *Rupp v. Eberly*, 79 Pa. St. 141; *Sponsler's Appeal*, 107 Pa. 95; *Morrow's Appeal*, 116 Pa. St. 440, 2 Am. St. Rep. 616, 9 Atl. 660; *Green's Estate*, 140 Pa. 253, 21 Atl. 317; *McCall v. McCall*, 161 Pa. 412, 29 Atl. 63; *Stevens's Estate*, 164 Pa. 209, 30 Atl. 243; *Yearnshaw's Appeal*, 25 Wis. 21.

said: "It is true that the testator can not confide to another the right to make a will for him, and it is equally true that he can not leave to another the power to revoke his will after his death, because the statute says that wills shall be revoked only in the manner prescribed by it, and if the will be destroyed by some person other than the testator, it must be destroyed in the presence of the testator, and by his direction, but there is nothing in the statute to prevent a man from saying that the question whether a paper shall be operative or otherwise shall depend upon an event to happen after his death." In this case the wife exercised her option by rejecting the codicil, and it was denied probate.¹⁷ The result, therefore, may be said to have been correct. A will is the expression by the testator of his intentions; it can not be made for him by any other person. If the maker of the codicil did not himself intend it to be his testamentary act, there was a lack of *animus testandi*, and the instrument should have been rejected. If, however, a testator intends a duly executed document as his last will, he can not grant the authority to another to revoke it after his death. Where, therefore, a testamentary instrument expresses in terms on its face that it is to become operative or not at the election of a third person after the testator's demise, it is in effect an attempt to empower such third person to either make or revoke the will. Although the law permits a will to be so drawn that it may become effective only on the happening of some contingent event subsequent to the death of the maker, yet no such condition could be declared valid if it were contrary to good morals or public policy. Wills are statutory; they can be made only in the manner prescribed by statute. The

¹⁷ Goods of Smith, L. R. 1 P. & D. 717.

condition in the codicil before mentioned is contrary to the law of wills.

§ 115. "Alternative" Wills.

The designation "alternative" has been used in connection with more than one testamentary document of the same maker, either of which was to become operative in the event of a stated contingency. Thus, a testator executed two wills, then subsequently by codicil he provided one will should become effective if he died before a certain date, otherwise the other.¹⁸ Reports of such instances of so-called alternative wills are extremely rare; there is, however, no legal objection to them, but care should be exercised in identifying the different instruments.

¹⁸ In re Hamilton's Estate, 74 Pa. St. 69,

CHAPTER VI.

DUPLICATE WILLS.

- § 116. Definition of duplicate wills.
- § 117. Inconsistent wills executed at the same time: Construed together, if possible.
- § 118. One copy only admitted to probate, but both should be produced.
- § 119. Revocation is presumed when a copy known to have been in the testator's possession can not be found after his death.
- § 120. Revocation of one duplicate causes presumption of intent to revoke both.
- § 121. No revocation except the intent exists.
- § 122. The facts may show a lack of intention to revoke.
- § 123. The presumption of revocation may be repelled by evidence: Burden of proof.
- § 124. The extent to which parol declarations may be admitted to prove or disprove revocation.
- § 125. The same subject: As showing lack of intent to revoke.
- § 126. The same subject: Held inadmissible.

§ 116. Definition of Duplicate Wills.

Duplicate wills, so-called, in fact is a single will executed in duplicate, each instrument being in the same language and being subscribed and published before the same witnesses and at the same time. Each duplicate is the will of the testator and the fact that one was executed a few moments subsequent to the other is not a can-

cellation of the former.¹ The reason for such procedure is merely a matter of precaution to insure against dying intestate in the event that a single will might be lost or destroyed by accident. Duplicate wills and the reason therefor were recognized in the Institutes of Justinian and in the Pandects.²

§ 117. Inconsistent Wills Executed at the Same Time: Construed Together, if Possible.

Two testamentary documents executed according to all required formalities at the same time and before the same witnesses, are taken together as the will of the testator. If the provisions of such instruments are different, one containing devises or legacies not contained in the other, both must be admitted to probate and they are read and construed together.³ It may be that the writings are so inconsistent with each other that they both can not stand, in which case the will first executed, if it can be identified as the first will, would be revoked by the execution of the second. If, however, they can not be distinguished as to the time of execution and are so inconsistent that they can not be construed together, probate of either seems impossible. But the courts, to pre-

¹ Hubbard v. Alexander, L. R. 3 Ch. Div. 738; Doe d. Strickland v. Strickland, 8 Com. Bench 724; Burtenshaw v. Gilbert, 1 Cowp. 49; Pemberton v. Pemberton, 13 Ves. Jun. 291; Rickards v. Mumford, 2 Phillim. 23; Colvin v. Fraser, 2 Hagg. 266; Roberts v. Round, 3 Hagg. 548; Onions v. Tyrer, 1 P. Wms. 343; Odenwaelder v. Schorr, 8 Mo. App. 458; Matter of

Forman's Will, 54 Barb. (N. Y.) 274; Crossman v. Crossman, 95 N. Y. 145; O'Neill v. Farr (Farr v. O'Neill), 1 Rich. (S. C.) 80.

² Inst. Just., lib. 2, tit. 10, § 13; Domat, pt. 2, lib. 3, tit. 1, § 1, art. 17, and § 7, art. 25.

³ Townsend v. Moore, (1905) P. 66; Matter of Forman's Will, 54 Barb. (N. Y.) 274; Crossman v. Crossman, 95 N. Y. 145.

vent intestacy, will admit both documents if, on any reasonable construction, they can both stand.⁴

§ 118. One Copy Only Admitted to Probate, but Both Should Be Produced.

Where two wills have been executed at the same time and each is an exact duplicate of the other, either can be produced and admitted to probate. Contracts, leases, and the like are commonly executed in duplicate, each party retaining a copy and, each being alike, either party can go into court and produce his duplicate without proving or requiring the production of the other copy. In the case of duplicate wills it has been said that there is no more reason or authority for requiring both to be offered than there would be in the case of any agreement where two or more copies, exactly alike, had been executed. This, of course, presumes that the outstanding copy is identical with the one offered, for if a contest is made on the ground that there is an outstanding will not a duplicate of the one presented for probate, the court should demand the production of such other will in order that it might be compared.⁵ But, however, the court in all cases must be satisfied that the instrument offered for probate is the last will and testament of the deceased, and it can not stand as such if there had been a revoca-

⁴ *Townsend v. Moore*, (1905) P. 66. See, also, *Freeman v. Freeman*, 5 De Gex, M. & G. 704; *Lemage v. Gooddhan*, L. R. 1 P. & D. 57; *In re De La Saussaye*, L. R. 3 P. & D. 42.

Where a testator made his will, then the next day, shortly before noon, executed a codicil to such will, then about one-twenty o'clock

in the afternoon of the same day he executed another will which contained a clause revoking former wills, it was held the last instrument prevailed as the last wish of the testator. — *Head v. Nixon*, 22 Ida. 765, 128 Pac. 557.

⁵ *Hubbard v. Alexander*, L. R. 3 Ch. Div. 738; *Doe d. Strickland v. Strickland*, 8 Com. Bench 724;

tion. There is no need of probating two identical documents, and it early developed that one of the duplicates was called the "authentic" will and it only was probated. But the due revocation of one of the duplicates causes the presumption to arise that both were thereby revoked. The revocation may have been accomplished by the destruction of the copy in the testator's possession, the other being in the custody of some third person. And although only one copy need be accepted for probate, yet both copies should be produced in court and if one is missing, the reason therefor should be explained since the fact of its non-existence, in the absence of evidence to the contrary, gives rise to the presumption that the copy presented had been revoked.⁶

§ 119. Revocation Is Presumed When a Copy Known to Have Been in the Testator's Possession Can Not Be Found After His Death.

It is well settled that if a decedent during his lifetime was known to have had his will in his possession and after his death it can not be found, it is presumed that

Burtenshaw v. Gilbert, 1 Cowp. 49; *Pemberton v. Pemberton*, 13 Ves. Jun. 291; *Rickards v. Mumford*, 2 Phillim. 23; *Colvin v. Fraser*, 2 Hagg. 266; *Roberts v. Round*, 3 Hagg. 548; *Onions v. Tyrer*, 1 P. Wms. 343; *Odenwaelder v. Schorr*, 8 Mo. App. 458; *Matter of Forman's Will*, 54 Barb. (N. Y.) 274; *Crossman v. Crossman*, 95 N. Y. 145; *O'Neill v. Farr* (*Farr v. O'Neill*), 1 Rich. (S. C.) 80.

In *Hubbard v. Alexander*, L. R. 3 Ch. Div. 738, two codicils, identical in terms, but executed at

different times and before different witnesses, were held to be one instrument, and the bequests not cumulative. In this case the codicils were attached to the two copies of a duplicate will, one of which had been retained by the testator, the other having been deposited with his banker.

⁶ *Killican v. Lord Parker*, 1 Lee 662; *Boughey v. Moreton*, 2 Lee 532; *Crossman v. Crossman*, 95 N. Y. 145; *Roche v. Nason*, 185 N. Y. 128, 77 N. E. 1007; In re *Schofield's Will*, 129 N. Y. Supp. 190.

the will was destroyed by the testator with the intention to revoke it.⁷ It would be a criminal act for a third person to destroy the will of another without the knowledge or consent of the testator or to wrongfully purloin or secrete the same; and the law does not presume that a crime has been committed.⁸ The same principle is applicable to wills executed in duplicate where the testator deposits one copy with his attorney or some other party and keeps the other copy in his own possession. If the copy known to have been in the custody of the testator prior to his death can not be found after his demise, the first presumption is that he destroyed it with the intent to revoke it, and, secondly, that he intended thereby to revoke the duplicate copy in the possession of another.⁹

§ 120. Revocation of One Duplicate Causes Presumption of Intent to Revoke Both.

Where a will has been executed in duplicate, it is generally the custom that, for safe keeping, one copy is left with the attorney who drew the documents or with some

⁷ *Richards v. Mumford*, 2 Philim. 23; *Loxley v. Jackson*, 3 Phillim. 126; *In re Wear's Will*, 131 App. Div. 875, 116 N. Y. Supp. 304; *In re Schofield's Will*, 129 N. Y. Supp. 190; *Knapp v. Knapp*, 10 N. Y. 276; *Collyer v. Collyer*, 110 N. Y. 481, 6 Am. St. Rep. 405, 18 N. E. 110; *In re Cunnion*, 201 N. Y. 123, Ann. Cas. 1912A, 834, 94 N. E. 648.

⁸ *Richards v. Mumford*, 2 Philim. 23; *Loxley v. Jackson*, 3 Phillim. 126.

⁹ *Colvin v. Fraser*, 2 Hagg. Ecc. 266; *In re Schofield's Will*, 129 N. Y. Supp. 190. In the case last

cited the court said in effect that the testator might have been of the opinion that the destruction of the duplicate in his possession was sufficient and that it was unnecessary to cancel the copy not in his custody; therefore no presumption should be drawn from his passive acts.

In *Webster v. Gowland*, Prerog. Mich. Term, 1804, cited in *Colvin v. Fraser*, 2 Hagg. Ecc. 266, at page 330, Sir William Wynn said: "It is an admitted rule that the cancellation of a part, in the testator's possession, would be a cancellation of a duplicate in the

third person, the testator retaining custody of the other. It may happen, however, that the maker of the will retains possession of both copies. The question of revocation depends in a large measure upon the facts and circumstances surrounding the particular case as having a bearing upon the question of intention to revoke, since there is no revocation if it can be legally shown that there was no such intention.

Revocation of a will may be accomplished by the execution of another will or codicil which revokes it, or by destroying the will, or the like. Certain presumptions of law attend the mutilation or destruction by the testator of one copy of a duplicate will which he has retained in his possession, the other having been deposited with some third person. Each duplicate being the will of the maker, the destruction by him of the copy of which he has retained the custody, causes the presumption to arise that he thereby intended to revoke both copies.¹⁰ This presumption still holds, although in a weaker degree,

hands of another person." In the latter case, commenting on the foregoing, the court said: "The reason of this rule is obvious; for why should a person destroy or cancel the duplicate of his will, if he meant the other part to operate? It may, indeed, be shown that it was done *diverso intuitu*, or by accident, or while of unsound mind, or for the sake of peace, and to deceive and impose upon the persons who were importuning him; but, *prima facie*, the cancellation or destruction of the part in possession infers the revocation of the duplicate." As to the effect of destroying a

codicil, the will not being in the possession of the testator, see *Malone's Admr. v. Hobbs*, 1 Rob. (Va.) 346, 385, 39 *Am. Dec.* 263.

¹⁰ *Welsh v. Gowland*, *Prerog. Mich. Term*, 1804; *Onions v. Tyrer*, 1 P. Wms. 343; s. c., 2 Vern. 742; *Doe d. Strickland v. Strickland*, 8 Com. Bench 724; *Limbrey v. Mason and Hyde*, 2 Comyns 451; *Burtenshaw v. Gilbert*, 1 Cowp. 49; *Richards v. Mumford*, 2 Phillim. 23; *Colvin v. Fraser*, 2 Hagg. 266; *Pemberton v. Pemberton*, 13 Ves. Jun. 291; *Managle v. Parker*, 75 N. H. 139, *Ann. Cas.* 1912A, 269, 24 L. R. A. (N. S.) 180, 71 Atl. 637; *In re Schofield's Will*, 129 N. Y.

where a testator retains possession of both copies and destroys but one of them. Having had the power to do so, the failure to destroy both copies would indicate either that the testator intended the remaining copy to stand as his will or that, having had the intention of revocation and having partly consummated it, he had abandoned it by preserving the other duplicate intact. And if, having both duplicates in his possession, the testator alters but a single copy and then destroys the one so altered, the presumption of revocation, if it can be said to exist at all, is very weak.¹¹

§ 121. No Revocation Except the Intent Exists.

An intent to revoke must exist, and the act of mutilation or partial destruction by a testator of two copies of a duplicate will in his possession is not a total or partial revocation in those cases where the facts show the lack

Supp. 190; *Betts v. Jackson*, 6 Wend. (N. Y.) 173; *Crossman v. Crossman*, 95 N. Y. 145; *Roche v. Nason*, 185 N. Y. 128, 77 N. E. 1007; *O'Neill v. Farr* (*Farr v. O'Neill*), 1 Rich. (S. C.) 80. See, also, *Seymour's Case*, cited in 1 P. Wms. at p. 346; s. c., 2 Vern. 742; *Boughey v. Moreton*, 3 Hagg. Ecc. 191; s. c., 2 Lee Ecc. 532; *Hubbard v. Alexander*, 3 Ch. Div. 738.

¹¹ *Pemberton v. Pemberton*, 13 Ves. Jun. 291; *Snider v. Burks*, 84 Ala. 53, 4 So. 225. See, also, *Doe d. Strickland v. Strickland*, 8 Com. Bench 724.

In *Goods of Hains*, 5 Notes of Cas. 621, the testator executed in duplicate a codicil to his will, one copy being left with his solicitor, the testator retaining the other.

Subsequently he had the same solicitor draw another codicil as a substitute for the former and upon executing it in the solicitor's office he destroyed the duplicate which he had left with him. After the testator's death the other duplicate of the former codicil was found among his effects enclosed with his will in the envelope originally belonging to said paper. It was held that there had been a revocation of both copies.

In *Burtenshaw v. Gilbert*, 1 Cowp. 49, Lord Mansfield said that cancellation requires an intent to revoke or there is no revocation. In that case the testator executed his will in duplicate, later he made another will revoking all former wills, at the same time deliber-

of intent. Thus, where a testatrix executed her will in duplicate and left one copy with her solicitor, which she later took into her possession, and at her death both duplicates were in one envelope, indorsed in her handwriting, "My will, dated the 11th of April, 1814," and the word "mine" written by her in pencil on one will, the duplicate of which had been mutilated by cutting out the names of several devisees, Sir John Nicholl held that the mutilation was neither a total nor a partial revocation, for it shows at the most that the testatrix was prepared to change her will, but regarding which she either had not finally made up her mind or had abandoned such intention, and the preservation of the other copy showed a lack of intention to revoke.¹²

§ 122. The Facts May Show a Lack of Intention to Revoke.

The circumstances surrounding the case affect the question of revocation. Thus a testator who has made his will in duplicate, retaining possession of but one copy, may greatly alter his own duplicate and begin to write a new will which, however, he does not finish, nor does he seek to have the other copy returned to him from the possession of its custodian. Such facts would not show a revocation. An imperfect sketch of an intended will which was never completed, is neither a will nor a revocation of a former testamentary disposition. It shows that the party did not intend to die intestate and if the

ately canceling a copy of the duplicate will which he had in his possession, the other not being in his possession. Subsequently he canceled his last will. After his death the last will was found among his effects together with the uncanceled copy of his dupli-

cate will. It was held that the cancellation of the second will did not revive the former will which had been revoked.

¹² *Roberts v. Round*, 3 Hagg. 548. See, also, *Goods of Eeles*, 2 Sw. & Tr. 600.

incomplete sketch could not be offered for probate as his will, the former must stand.¹³

§ 123. The Presumption of Revocation May Be Repelled by Evidence: Burden of Proof.

The presumption of law that the destruction of one duplicate revokes the other may be repelled by evidence,¹⁴ but the burden of proof is upon the party who seeks to overcome it. The force of the presumption and the weight of the burden of proof will differ according to circumstances. If one duplicate of the testator's will was actually destroyed by himself, or a copy known to have been in his possession during his lifetime can not be produced, the other copy can not be admitted to probate unless the court is judicially convinced that the testator never intended to revoke his will or that it was in existence at the time of his death, but thereafter lost. The lack of intent to revoke may be established by showing that the destruction of the instrument was through an accident, that it was destroyed by the testator while of unsound mind, that it was an attempt on his part to deceive others who were seeking to have him change his will, or that it was fraudulently destroyed by some third person. In the last instance the proof would have to be much stronger than in the others, since the presumption of innocence prevails, and if fraud is charged, it must be clearly proven.¹⁵

¹³ *Limbrey v. Mason and Hyde*, 2 Comyns 451; *Burtenshaw v. Gilbert*, 1 Cowp. 49; *Goodright d. Glazier v. Glazier*, 4 Burr. 2512, 2515.

¹⁴ *Rickards v. Mumford*, 2 Philim. 23.

¹⁵ *Colvin v. Fraser*, 2 Hagg. Ecc. 226; *Bouhey v. Moreton*, 3 Hagg. Ecc. 191, n.; *Managle v. Parker*, 75 N. H. 139, Ann. Cas. 1912A, 269, 24 L. R. A. (N. S.) 180, 71 Atl. 637.

§ 124. The Extent to Which Parol Declarations May Be Admitted to Prove or Disprove Revocation.

It is an unsettled question as to the admission of parol declarations by a testator to either prove that he had made a will or prove the fact of its revocation or of its continued existence. Declarations which are made at the time of the execution or the revocation of a will are, of course, admissible as part of the *res gestæ*. For instance, if the testator while destroying certain papers in the presence of others should unintentionally tear his will into two parts and then and there declare that it had been a mistake and should paste them together again, evidence of his declarations and of his actions would be admissible. But where the declarations of the testator do not accompany any act which the law prescribes for the revoking of wills, it is doubtful if evidence of the same can be admitted.¹⁶

§ 125. The Same Subject: As Showing Lack of Intent to Revoke.

An interesting case arose in New Hampshire. One will was drawn up, but before it was signed and witnessed one line was crossed out; afterward a second will, iden-

¹⁶ Throckmorton v. Holt, 180 U. S. 552, 45 L. Ed. 663, 21 Sup. Ct. 474; Dan v. Brown, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395; Jackson v. Betts, 6 Cow. (N. Y.) 377; Grant v. Grant, 1 Sandf. Ch. (N. Y.) 483, 15 Am. Dec. 395; Jackfen, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390; Voorhis v. Voorhis, 50 Barb. (N. Y.) 119; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71; Elghmy v. People, 79 N. Y. 546; Horn v. Pullman, 72 N. Y.

269; Marx v. McGlynn, 88 N. Y. 357; Sanford v. Ellithorp, 95 N. Y. 48; Matter of Kennedy, 167 N. Y. 163, 60 N. E. 442. But see, contra: Managle v. Parker, 75 N. H. 139, Ann. Cas. 1912A, 269, 24 L. R. A. (N. S.) 180, 71 Atl. 637.

As to the admissibility of evidence of parol declarations and surrounding circumstances to show the nature of an instrument offered for probate, see, ante, §§ 51, 52, 53.

As to the admissibility of ex-

tical with the first except for the omission of the erasure, was executed before the same witnesses. The testatrix gave the first draft to one of the witnesses to keep "in case anything happened," she retaining the second draft. About two years subsequent the testatrix destroyed the will she had in her possession and died some five years later. Testimony was admitted in the probate court of parol declarations of the testatrix to the effect that she had destroyed the will in her possession for the sake of peace because of the importunities of others, and her language showed in effect that she thought the other draft would stand as her will. On appeal this evidence was held proper on the principle that evidence of oral declarations is admissible to show lack of intent.¹⁷ In this

trinsic evidence as affecting the question of revocation, see, ante, § 54.

As to the construction of joint wills being controlled by their contents, see, ante, §§ 78, 79.

As to the evidence necessary to establish agreements to execute mutual or reciprocal wills, see, ante, §§ 92, 93.

As to the admissibility of extrinsic evidence to show whether or not the maker of a will intended it to be conditional, see, ante, §§ 110, 111, 112.

As to the evidence necessary to prove a contract to make a will, see, post, §§ 136, 138, 139.

17 *Managle v. Parker*, 75 N. H. 139, Ann. Cas. 1912A, 269, 24 L. R. A. (N. S.) 180, 71 Atl. 637.

The case just cited relied on *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322, where parol dec-

larations made after the cancellation of the will were allowed for the purpose of showing whether or not the testator intended to revive a former will which had not been destroyed. See, also, *Lane v. Hill*, 68 N. H. 275, 73 Am. St. Rep. 591, 44 Atl. 393.

As to the admissibility of evidence of parol declarations and surrounding circumstances to show the nature of an instrument offered for probate, see, ante, §§ 51, 52, 53.

As to the admissibility of extrinsic evidence as affecting the question of revocation, see, ante, § 54.

As to the construction of joint wills being controlled by their contents, see, ante, §§ 78, 79.

As to the evidence necessary to establish agreements to execute mutual or reciprocal wills, see, ante, §§ 92, 93.

case the formal act essential to revocation had taken place, namely, the destruction of the will, so that the issue before the court was solely a question of intention; thus it may differ from a case where the question is as to whether or not the formalities which the law prescribes for the revocation of a will had been accomplished.¹⁸ But even in those jurisdictions where evidence of such parol declarations is admissible it is received with caution since the statements may have been made by the testator for the purpose of deception, or may have been misunderstood or forgotten and, again, they may be misreported by design.¹⁹

§ 126. The Same Subject: Held Inadmissible.

In New York an attempt was made to draw a line of distinction between evidence of parol declarations offered for the purpose of proving the revocation of a will and like evidence to prove non-revocation. The court admitted that testimony of parol declarations which were not a part of the *res gestæ* could not be admitted for the purpose of proving the revocation of a will, but held such evidence admissible to prove the negative fact.²⁰ This case was based on an English decision which, how-

As to the admissibility of extrinsic evidence to show whether or not the maker of a will intended it to be conditional, see, ante, §§ 110, 111, 112.

As to the evidence necessary to prove a contract to make a will, see, post, §§ 136, 138, 139.

18 *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604; *Stevens v. Stevens*, 72 N. H. 360, 56 Atl. 916.

19 *Collagan v. Burns*, 57 Me. 449.

20 *Matter of Marsh*, 45 Hun (N. Y.) 107.

The decision in *Matter of Marsh*, supra, was based on that in the case of *Sugden v. Lord St. Leonards*, L. R. 1 Prob. Div. 154, which last-mentioned case, however, is in apparent conflict with the prior decision of *Marston v. Roe*, 8 Ad. & El. 14, and the effect of such decision has been considerably weakened by discussion in the following cases, viz.: *Doe v. Palmer*,

ever, is somewhat in conflict with a prior decision and has been questioned in subsequent English cases. The former New York decision was overruled in a subsequent case wherein it was held that evidence of witnesses to parol declarations of a testatrix down to the time of her death to the effect that she intended to dispose of her property by will and intended to leave as her testamentary papers the will and codicil in question, and giving directions regarding their whereabouts, but which could not be found after her death, was held inadmissible. The fact in issue was whether the will had been physically in existence at the time of the death of the testatrix and, if not, whether it had been fraudulently destroyed during her life. The court said, in effect, that if the existence of a will may be proved by parol declarations of a deceased, then there is no reason why the execution and contents of a will might not likewise be proved, and thus testamentary dispositions be established by parol declarations of a decedent.²¹ The weight of

16 Ad. & El. (N. S.) 757; *Woodward v. Goulstone*, L. R. 11 App. Cas. 469; *Atkinson v. Morris*, (1897) P. 40. *Matter of Marsh*, supra, was overruled in *Matter of Kennedy*, 167 N. Y. 163, 60 N. E. 442.

As to the admissibility of evidence of parol declarations and surrounding circumstances to show the nature of an instrument offered for probate, see, ante, §§ 51, 52, 53.

As to the admissibility of extrinsic evidence as affecting the question of revocation, see, ante, § 54.

As to the construction of joint

wills being controlled by their contents, see, ante, §§ 78, 79.

As to the evidence necessary to establish agreements to execute mutual or reciprocal wills, see, ante, §§ 92, 93.

As to the admissibility of extrinsic evidence to show whether or not the maker of a will intended it to be conditional, see, ante, §§ 110, 111, 112.

As to the evidence necessary to prove a contract to make a will, see, post, §§ 136, 138, 139.

²¹ *Matter of Kennedy*, 167 N. Y. 163, 60 N. E. 442.

authority seems to be that parol declarations which are no part of the *res gestæ* are inadmissible to prove either the fact of revocation or of non-revocation.²²

This case involved only a single will and codicil which could not be found after the death of the testatrix, and the point at issue was whether evidence of parol declarations could prove their existence or fraudulent destruction. The court in its decision takes the apparent position that the proceeding is under the statute dealing with lost or destroyed wills and that under such statute the instrument must have been in existence at the time of the death of the testatrix. In this regard the

case might be distinguished from that of a will which had been executed in duplicate and where one copy could be produced and offered for probate, although the other copy which was known to have been in the possession of the testator during his life time could not be found after his death, and was therefore presumed to have been revoked.

²² Throckmorton v. Holt, 180 U. S. 552, 45 L. Ed. 663, 21 Sup. Ct. 474. See citations under § 124.

CHAPTER VII.

LOUISIANA TESTAMENTS OR THE LAW OF WILLS IN LOUISIANA.

- § 127. Definition of the term "testament" in Louisiana.
- § 128. Disposition by intervention of a third person abolished.
- § 129. Testaments valid if duly executed, irrespective of their designation.
- § 130. Classification of testaments in Louisiana.
- § 131. Nuncupative testaments by public act.
- § 132. The same subject: Further requirements.
- § 133. Nuncupative testaments by act under private signature.
- § 134. Mystic or secret testaments.

§ 127. Definition of the Term "Testament" in Louisiana.

The law of wills in Louisiana is adopted from the Code Napoleon, some sections being copied literally. In the Civil Code of Louisiana the terms "testament" and "nuncupative testament" are applied to written wills and are used in contradistinction to the term "mystic testament." The distinction between the terms as used in Louisiana and those commonly found in use with reference to the common law, must be borne in mind. A testament is defined as the "act of last will, clothed with certain solemnities, by which the testator disposes of his property, either universally, or by universal title, or by particular title."¹

¹ La. Civ. Code, art. 1571.

Regarding mutual or reciprocal wills, the statute of Louisiana provides that "a testament can not be made by the same act by two or more persons, either for the

benefit of a third person, or under the title of reciprocal or mutual disposition."—La. Civ. Code, art. 1572. See *Orline v. Heirs of Haggerty*, 12 La. Ann. 880.

§ 128. Disposition by Intervention of a Third Person Abolished.

The statute prohibits testamentary dispositions to be left to the choice of some third person, even though such choice is limited to a certain number of persons designated by the testator; thus the institution of an heir or providing for the intervention of an attorney in fact for such a purpose is prohibited.²

§ 129. Testaments Valid if Duly Executed, Irrespective of Their Designation.

Donations *causa mortis* are abolished except when made by last will and testament. It is of no importance, however, what name be given to the act of last will provided that it be duly executed with all the formalities prescribed for the validity of testaments, and that the dispositions which it makes, or the manner in which it was made, clearly establishes the fact that it was intended as a final testamentary disposition.³

² La. Civ. Code, art. 1573.

Construction of foreign wills in Louisiana.—The formalities required by the law of Louisiana for the execution of testaments must be strictly observed, otherwise the testaments are null and void.—La. Civ. Code, art. 1595. But testaments made in foreign countries or in other states or territories of the United States, have the same effect in Louisiana as testaments executed under the laws of that state if they are executed with and according to all the formalities prescribed for the validity of wills in the places where they were made.—La. Civ. Code, art. 1596;

but compare La. Civ. Code, arts. 1573, 1595. This is an exception to the general rule, but, however, as to the construction of the contents of the will and the distribution of property thereunder, in so far as it affects property in Louisiana, it is construed according to the law of that state.—*Jones v. Hunter*, 6 Rob. Rep. (La.) 235; *Succession of Withers*, 45 La. Ann. 556, 12 So. 875.

³ La. Civ. Code, art. 1570; *Succession of De Bellisle*, 10 La. Ann. 468; *Succession of Ehrenberg*, 21 La. Ann. 280, 99 Am. Dec. 729; *Lucas v. Brooks*, 23 La. Ann. 117.

§ 130. Classification of Testaments in Louisiana.

Testaments in Louisiana are divided into three principal classes, to-wit, nuncupative or open testaments, mystic or sealed testaments, and holographic testaments. Whether a testament be nuncupative or mystic, it must be drawn up in writing either by the testator himself or by some person under his direction. The custom of making verbal testaments, that is to say, resulting from the mere deposition of witnesses who were present when the testator made known to them his will without his having committed or caused it to be committed to writing, is abrogated.⁴

§ 131. Nuncupative Testaments by Public Act.

Nuncupative testaments may be by public act, or by act under private signature. In Louisiana nuncupative testaments must be in writing. If made by public act, the testator, in the presence of three witnesses who are residents of the place where the will is executed, or five if they be non-residents, must dictate his testament to a notary public who must write it as dictated; the testament must then be read to the testator in the presence

⁴ La. Civ. Code, arts. 1574, 1575, 1576.

An olographic or holographic testament is one which is written by the testator himself, and in order to be valid it must be entirely written, dated and signed by the hand of the maker. It is subject to no other form and can be made anywhere, even out of the State of Louisiana.—La. Civ. Code, art. 1588.

Succession of Fuqua, 27 La. Ann. 271; Succession of Morvant, 45

La. Ann. 207, 12 So. 349; Zerega v. Percival, 46 La. Ann. 590, 15 So. 476; Heffner v. Heffner, 48 La. Ann. 1088, 20 So. 281.

The law of Louisiana relative to the wills of soldiers in the field or on a military expedition and of sailors at sea has been taken almost literally from the Code Napoleon.—La. Civ. Code, arts. 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1604; Code Napoleon 981, 982, 984, 985, 987, 988, 995, 996, 997.

of the witnesses. All formalities must be complied with without interruption.⁵ If the testament is written in a language which the testator does not understand, even though correctly translated, it is null and void since it is not written in the language dictated.⁶ The dictation must be oral; it is not sufficient for the testator to put his wishes on slips of paper and hand them to the notary.⁷ Nuncupative testaments by public act are held to be full proof of themselves when offered for probate, and no further proof is required unless they are alleged to have been forged.⁸

§ 132. The Same Subject: Further Requirements.

It is not necessary that the exact language of the testator be used if his intention be clearly expressed and the notary faithfully sets forth the same.⁹ The notary may change the speech of an ignorant person into polite language if the exact meaning be retained;¹⁰ and counsel may assist in selecting words so as to clearly express the meaning.¹¹

The law requires that there must be an express mention in the nuncupative testament by public act that it was dictated to the notary, written by the notary, read to the testator in the presence of the required witnesses, and that all the formalities prescribed by statute were complied with.¹² The notary must state the qualifications of the witnesses and set forth in his certificate the full

⁵ La. Civ. Code, arts. 1577, 1578.

⁶ *Gonzales v. Gonzales*, 13 La. (O. S.) 104.

⁷ *Succession of Theriot*, 114 La. 611, 38 So. 471.

⁸ La. Civ. Code, art. 1647; *Succession of Block*, 131 La. 101, 59 So. 29.

⁹ *Starrs v. Mason, Exr.*, 32 La. Ann. 8.

¹⁰ *Succession of Saux*, 46 La. Ann. 1423, 16 So. 364.

¹¹ *Landry v. Tomatis*, 32 La. Ann. 113.

¹² *Succession of Vollmer*, 40 La. Ann. 593, 4 So. 254; *Succession of*

proof of the facts of their competency.¹³ The testament must be signed by the testator, but if he is unable to write his name he must declare the fact, and express mention of such declaration, together with the cause which prevents him from signing, must be set forth. The witnesses must sign the testament, or at least one of them must sign for all if the others can not write.¹⁴ If any fact be not stated, the omission can not be supplied by parol.¹⁵

§ 133. Nuncupative Testaments by Act Under Private Signature.

A nuncupative testament under private signature must likewise be in writing. A notary is not required, but witnesses are essential. The testament must be written by the testator himself or by some other person from his dictation, or by one of the witnesses in the presence of five witnesses residing in the place where the will is received, or seven witnesses who reside elsewhere; or it is sufficient if the testator, in the presence of the same number of witnesses, presents the paper on which he has written his testament or caused it to have been written out in their presence, and declares to them that such paper contains his last will.¹⁶

Murray, 41 La. Ann. 1109, 7 So. 126; Succession of Del Escobal, 42 La. Ann. 1086, 9 L. R. A. 829, 8 So. 268; Succession of Vidal, 44 La. Ann. 41, 10 So. 414.

¹³ Succession of Vollmer, 40 La. Ann. 593, 4 So. 254; Succession of Murray, 41 La. Ann. 1109, 7 So. 126.

¹⁴ La. Civ. Code, arts. 1579, 1580.

¹⁵ Succession of Dorries, 37 La. Ann. 833; Weick v. Henne, 41 La. Ann. 1153, 5 So. 528; Monroe v.

Liebman, 47 La. Ann. 155, 16 So. 734.

The declaration of the testator that he is unable or ignorant of how to write or sign his name, if attested in the notary's certificate, is sufficient to fulfill the requirement of the signing by the testator and it is not necessary that he make his mark. See *Hennessey's Heirs v. Woulfe*, 49 La. Ann. 1376, 22 So. 394.

¹⁶ La. Civ. Code, art. 1581; Succession of Reems, 115 La. 102, 38

The testament must be read to the witnesses either by the testator or by one of the witnesses in his presence. The instrument must be signed by the testator if he know how or is able to sign, and by witnesses, or at least two of them in case the others do not know how to sign, such other witnesses affixing their marks.¹⁷ A nuncupative testament under private signature, when offered for probate, must be proved by the declarations under oath of at least three witnesses who were present when it was made.¹⁸

§ 134. Mystic or Secret Testaments.

A mystic or secret testament, otherwise called a closed testament, is one regarding which the contents are not made public. The testament contains the dispositions which the testator desires regarding his property, and it may be written by himself personally or he may cause it to be written by another person. The testator must sign the paper, whether written by himself or another, and then the paper itself, or another paper serving as an envelope, must be closed and sealed. Sealing, however, does not mean the affixing of a seal, but merely that the testament must be securely enclosed or stuck together

So. 930; *Acosta v. Marrero*, 16 La. Ann. 136; *Prendergast v. Prendergast*, 16 La. Ann. 219, 79 Am. Dec. 575; *Wood v. Roane*, 35 La. Ann. 865; *Bourke v. Wilson*, 38 La. Ann. 320; *Pfarr & Kullman v. Belmont*, 39 La. Ann. 294, 1 So. 681.

Art. 1583 of the La. Civ. Code provides that if a nuncupative testament under private signature be executed in the country, three resident witnesses or five non-resident witnesses are sufficient in case a greater number can not be

had. See, also, *Sophie v. Duplessis*, 2 La. Ann. 724; *Baillio v. Innis's Exr.*, 12 La. (O. S.) 483; *Verdun's Heirs v. Verdun's Exr.*, 15 La. (O. S.) 28.

¹⁷ La. Civ. Code, art. 1582; *Buntin v. Johnson*, 28 La. Ann. 796; *Wood v. Roane*, 35 La. Ann. 865; *Bourke v. Wilson*, 38 La. Ann. 320.

¹⁸ La. Civ. Code, art. 1648; *Succession of Theriot*, 114 La. 611, 617, 38 So. 471.

All witnesses must understand

with mucilage or some other adhesive substance.¹⁹ The testator must present his dispositions thus closed and sealed to a notary public and to three witnesses, or he shall cause it to be closed and sealed in their presence. He shall then declare to the notary in the presence of the witnesses that the paper contains his testament written by himself, or by another at his direction, and signed by him. The notary shall then draw up the act of superscription, which shall be written on the paper or the envelope enclosing it, and that act shall be signed by the testator and by the notary and the witnesses. These formalities must be complied with without interruption; and in case the testator, by reason of any hindrance that has happened since the signing of the testament, can not sign the act of superscription, mention must be made of the declaration made by himself thereof, in which case it is not necessary to increase the number of witnesses.²⁰ Those who do not know how or are unable to write or to sign their names, can not make dispositions in the form of a mystic will.²¹

the language in which the will was dictated and written, otherwise they are disqualified from acting as such and, if those disqualified leave an insufficient number of witnesses to the testament, the will is void. The fact that while the testament was being dictated it was translated to a witness, is insufficient.—*Succession of Dauterive*, 39 La. Ann. 1092, 3 So. 341.

19 *Saint v. Charity Hospital*, 48 La. Ann. 236, 19 So. 275; *Hart v. Thompson's Exr.*, 15 La. 88.

20 La. Civ. Code, arts. 1584, 1585.

21 La. Civ. Code, art. 1586.

"If any of the witnesses to the

act of superscription are unable to sign the same, express mention shall be made of the fact; but in all cases the act must be signed by at least two witnesses."—La. Civ. Code, art. 1587.

Mystic testaments, to be proved for probate, require the declarations under oath of at least four of the witnesses who were present at the time of the act of superscription. The death or absence of one or more witnesses, however, dispenses with the necessity of producing such witnesses. This applies to all wills.—La. Civ. Code, arts. 1650, 1653.

CHAPTER VIII.

CONTRACTS TO MAKE WILLS.

- § 135. Relationship of wills and contracts to each other.
- § 136. Oral contracts to will property viewed with distrust.
- § 137. Agreement to devise may be based on a future consideration.
- § 138. The necessity of an agreement, express or implied.
- § 139. Evidence necessary to prove the agreement.
- § 140. Services to be rendered a valid consideration for promise to will property.
- § 141. Compensation for services rendered can be recovered.
- § 142. Compensation for services; what can be recovered.
- § 143. Promise to compensate for services by will not invalidated by quick death of promisor.
- § 144. No right of action for compensation for services until after death of promisor.
- § 145. Acceptance of other gifts by promisee may waive his rights under the agreement.
- § 146. Equity enforces an agreement to will property by charging it with a trust.
- § 147. Specific performance: An exception to the rule that contracts should be mutual.
- § 148. The promisor is merely restricted to the reasonable use of the property agreed to be willed to another.
- § 149. Probate court has no jurisdiction to enforce agreements to devise property.
- § 150. Statute of Limitations: Time when it commences to run.
- § 151. Statute of Frauds does not apply to oral agreements to bequeath personalty.
- § 152. Oral agreements to devise realty are void under Statute of Frauds.

- § 153. General rule is that specific performance of oral agreements to devise realty will be denied.
- § 154. Exceptions to general rule: When specific performance will be granted.
- § 155. Part performance may remove the bar of the Statute of Frauds.
- § 156. Part performance: Instances of, as affected by the Statute of Frauds.
- § 157. Possession of the property as affecting the Statute of Frauds.
- § 158. What description of the property is necessary.

§ 135. Relationship of Wills and Contracts to Each Other.

A contract is a mutual agreement between two parties, reciprocal in its nature, wherein on one side it is agreed that something shall be done or performed for a consideration flowing from the other side. All parties are mutually bound. A will, however, is merely the lawful intent of a competent person, legally expressed, regarding his estate and effective only after his death. It is ambulatory in character and has no binding force during his life. Contracts and wills are distinctive in their natures but are sometimes so combined that a contract may have the effect of a will, or a will may be converted into an agreement.¹ Every man has the right by law to dispose of his own property and he is the sole and best judge of the manner of its disposition. It may be unwise for him to so contract that the disposition of his property be limited, but there is no reason why he can not make a legal agreement to dispose of his property to a particular person or for a particular purpose, as well by will as by a conveyance to be made at some specified future time or to become effective upon the happening of some future

¹ In *re Cawley's Estate*, 136 Pa. St. 628, 10 L. R. A. 93, 20 Atl. 567.

event. A contract founded upon a valuable consideration to make certain provisions in a will for the benefit of a particular person, is valid in law.² Although a will is not a contract, yet the disposition of property by such a method may be the subject of a contract and the rights thus arising will be protected in equity.³

§ 136. Oral Contracts to Will Property Viewed With Distrust.

The opportunity which is offered to unscrupulous persons to defraud the estates of decedents under the claim that the deceased had made an oral agreement to will specified property to a certain person, has caused courts to grow distrustful of such contracts. Such agreements are hard to disprove as one of the contracting parties is always dead when the case arises. This has forced the courts to be conservative as to the nature of the evidence necessary to establish such agreements and to require that they be clearly and definitely proved. The testimony of witnesses should be viewed with great caution and their evidence should be rejected if they testify under bias or temptation of gain. If such an agreement is

² *Goilmer v. Battison*, 1 *Vernon* 48; *Owens v. McNally*, 113 *Cal.* 444, 33 *L. R. A.* 369, 45 *Pac.* 710; *Caviness v. Rushton*, 101 *Ind.* 500, 51 *Am. Rep.* 759; *Jenkins v. Stetson*, 9 *Allen (Mass.)* 128; *Parker v. Coburn*, 10 *Allen (Mass.)* 82; *Black v. Hill*, 117 *Ark.* 228, 174 *S. W.* 526; *Canada v. Canada*, 6 *Cush. (Mass.)* 15; *Fitch v. Fitch*, 8 *Pick. (Mass.)* 480; *Trull v. Eastman*, 3 *Metc. (Mass.)* 121, 37 *Am. Dec.* 126; *Wellington v. Apthorp*, 145 *Mass.* 69, 13 *N. E.* 10; *Johnson v. Hubbell*, 10 *N. J. Eq.* 332, 66 *Am. Dec.* 773; *Parsell v. Stryker*, 41

N. Y. 480; *Edson v. Parsons*, 155 *N. Y.* 555, 50 *N. E.* 265; *Adams v. Swift*, 169 *App. Div.* 802, 155 *N. Y. Supp.* 873; *Thompson v. Stevens*, 71 *Pa. St.* 161; *Rivers v. Rivers's Exrs.*, 3 *Desaus. (S. C.)* 190, 4 *Am. Dec.* 609; *McKeegan v. O'Neill*, 22 *S. C.* 454.

³ *Baker v. Syfritt*, 147 *Iowa* 49, 61, 125 *N. W.* 998; *McCabe v. Healy*, 138 *Cal.* 81, 70 *Pac.* 1008; *Baumann v. Kusian*, 164 *Cal.* 582, 44 *L. R. A. (N. S.)* 756, 129 *Pac.* 986; *Rogers v. Schlotterback*, 167 *Cal.* 35, 138 *Pac.* 728; *Blanc v. Connor*, 167 *Cal.* 719, 141 *Pac.* 217.

attempted to be proved by parol evidence, the testimony of any interested party should be corroborated in all substantial particulars by disinterested witnesses. If such an agreement would result in disinheriting lawful heirs who would be the natural recipients of the bounty of the deceased, it will be regarded with grave suspicion by the courts. It will be enforced only when the terms of the contract are clear and definite and have been fully established by legal evidence and, further, when the enforcement of such an agreement would not be inequitable or unjust.⁴

§ 137. Agreement to Devise May Be Based on a Future Consideration.

The obligation of a contract to make a certain bequest of personalty by will to a particular person is not impaired though the consideration is to arise wholly or in part in the future, and although the person to whom the promise was made was, at such time, under no legal obligation to perform. Thus the consideration for the prom-

⁴ Russell v. Jones, 135 Fed. 929, 68 C. C. A. 487; Owens v. McNally, 113 Cal. 444, 33 L. R. A. 369, 45 Pac. 710; Dicken v. McKinley, 163 Ill. 318, 54 Am. St. Rep. 471, 45 N. E. 134; Sloniger v. Sloniger, 161 Ill. 270, 43 N. E. 1111; Stiles v. Breed, 151 Iowa 86, 130 N. W. 376; Smith v. Humphreys, 104 Md. 285, 65 Atl. 57; Kinney v. Murray, 170 Mo. 674, 700, 71 S. W. 197; Wales v. Holden, 209 Mo. 552, 108 S. W. 89; Shakespeare v. Markham, 72 N. Y. 400; Brantingham v. Huff, 174 N. Y. 53, 95 Am. St. Rep. 545, 66 N. E. 620; Mahaney v. Carr, 175 N. Y. 454, 67 N. E. 903; Ham-

lin v. Stevens, 177 N. Y. 39, 69 N. E. 118; Ide v. Brown, 178 N. Y. 26, 70 N. E. 101; Rosseau v. Rouss, 180 N. Y. 116, 72 N. E. 916; Taylor v. Higgs, 202 N. Y. 65, 95 N. E. 30; In re McMillan's Estate, 167 App. Div. 817, 153 N. Y. Supp. 400; Van Horn v. Demarest, 76 N. J. Eq. 386, 77 Atl. 354; Rivers v. Rivers's Exrs., 3 Desaus. (S. C.) 190, 4 Am. Dec. 609; McKeegan v. O'Neill, 22 S. C. 454.

As to the admissibility of evidence of parol declarations and surrounding circumstances to show the nature of an instrument offered for probate, see, ante, §§ 51, 52, 53.

ise may be services to be rendered at some future date or money to be expended at some future time.⁵ For instance, a person, say in his declining years, may make a valid agreement to execute a will in favor of another in consideration of the other party taking care of him or providing him with comforts or a home. A conveyance by deed for such a consideration would be valid and there is no reason why he should not make an agreement to do the same thing by will. In such a case, if the promisor had accepted the benefits of the provisions made for him under the agreement and then had failed to make the will according to contract, equity would decree a conveyance of the property or a jury would give damages to the amount of the value of the property.⁶ This, of course, presumes a valid agreement, it being necessary to keep in mind the effect of the Statute of Frauds upon contracts involving real property.

§ 138. The Necessity of an Agreement, Express or Implied.

No recovery can be had under an alleged contract to will property unless an understanding to that effect, expressed or implied, be shown. If a party voluntarily renders services to another without any agreement as to

As to the admissibility of extrinsic evidence as affecting the question of revocation, see, ante, § 54.

As to the construction of joint wills being controlled by their contents, see, ante, §§ 78, 79.

As to the evidence necessary to establish agreements to execute mutual or reciprocal wills, see, ante, §§ 92, 93.

As to the admissibility of extrinsic evidence to show whether

or not the maker of a will intended it to be conditional, see, ante, §§ 110, 111, 112.

As to the extent to which parol declarations of a testator may be admitted to prove or disprove revocation, see, ante, §§ 124, 125, 126.

⁵ *Train v. Gold*, 5 Pick. (Mass.) 380; *Bornstein v. Lans*, 104 Mass. 214.

⁶ *Logan v. McGinnis*, 12 Pa. St. 27; *Johnson v. McCue*, 34 Pa. St. 180; *Wyche v. Clapp*, 43 Tex. 543.

compensation, but relying solely upon the other's generosity and hoping only to receive a legacy at such other's death, he would have no right of action against the estate of the other should such other die without having made any testamentary disposition in his favor. All surrounding circumstances, however, are to be considered and they may be such as to show that both parties understood that the one performing labor for the benefit of the other should be compensated under the other's will. Thus where a party, with full knowledge and approbation, has allowed another to expend money or perform services for his benefit, a promise on his part to pay will be implied unless it can be shown that payment was never intended; and, such a showing not being made, an action will lie to recover the amount of the expenditures or the value of the services.⁷

It is not necessary that express agreement be shown, but there must be evidence of a mutual understanding between the parties, either express or implied, that the party rendering the services shall be compensated; for if the services were rendered as a gratuity or upon the mere expectancy that the party receiving the benefit of the same would make compensation therefor by his will,

⁷ Scully v. Scully's Exr., 28 Iowa 548; Hankins v. Young, (Iowa) 156 N. W. 380; Harder v. Harder, 2 Sandf. Ch. (N. Y.) 17; Quackenbush v. Ehle, 5 Barb. (N. Y.) 469; Jacobson v. Exrs. of Lagrange, 3 Johns. (N. Y.) 199; Patterson v. Patterson, 13 Johns. (N. Y.) 379; Shakespeare v. Markham, 10 Hun (N. Y.) 311.

the nature of an instrument offered for probate, see, ante, §§ 51, 52, 53.

As to the admissibility of extrinsic evidence as affecting the question of revocation, see, ante, § 54.

As to the construction of joint wills being controlled by their contents, see, ante, §§ 78, 79.

As to the evidence necessary to establish agreements to execute mutual or reciprocal wills, see, ante, §§ 92, 93.

As to the admissibility of evidence of parol declarations and surrounding circumstances to show

the party rendering services would have no valid claim against the estate. The right of action arises because of the failure to compensate for services where there has been an agreement for such compensation, and it is immaterial whether the failure arose from accident or design.⁸

§ 139. Evidence Necessary to Prove the Agreement.

The relationship of the parties, as well as all the circumstances of the case, should be considered in determining whether or not there had been a valid oral contract to will property. As a general rule a parent is under no obligation to pay a child for labor performed or maintenance provided unless he has expressly agreed so to do. Should a son attempt to prove an oral agreement with a deceased parent to will him certain property for services rendered, such a contract could be established only by direct and positive evidence of disinterested witnesses. With reference to a son who had always lived with his parents, this rule would apply with added force. And if the property to be willed was land, the proof of the contract must be stronger than in the case where personal property only was involved.⁹

§ 140. Services to Be Rendered a Valid Consideration for Promise to Will Property.

Services previously performed by a person not a member of the promisor's family constitute a good considera-

As to the admissibility of extrinsic evidence to show whether or not the maker of a will intended it to be conditional, see, ante, §§ 110, 111, 112.

As to the extent to which parol declarations of a testator may be admitted to prove or disprove revocation, see, ante, §§ 124, 125, 126.

⁸ *Martin v. Wright's Admrs.*, 13 Wend. (N. Y.) 460, 28 Am. Dec. 468; *Quackenbush v. Ehle*, 5 Barb. (N. Y.) 469; *McRae v. McRae*, 3 Bradf. (N. Y.) 199; *Robinson v. Raynor*, 28 N. Y. 494.

⁹ *Hankins v. Young*, (Iowa) 156 N. W. 380; *Ackerman v. Fisher*, 57 Pa. St. 457; *Burgess v. Burgess*,

tion for the promise to pay for such services.¹⁰ A promise to reward a party who has previously rendered services, by making a provision for him by will, is valid.

109 Pa. St. 312, 1 Atl. 167; Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118; Wallace v. Wallace, 216 N. Y. 28, 109 N. E. 872.

As to the admissibility of evidence of parol declarations and surrounding circumstances to show the nature of an instrument offered for probate, see, ante, §§ 51, 52, 53.

As to the admissibility of extrinsic evidence as affecting the question of revocation, see, ante, § 54.

As to the construction of joint wills being controlled by their contents, see, ante, §§ 78, 79.

As to the evidence necessary to establish agreements to execute mutual or reciprocal wills, see, ante, §§ 92, 93.

As to the admissibility of extrinsic evidence to show whether or not the maker of a will intended it to be conditional, see, ante, §§ 110, 111, 112.

As to the extent to which parol declarations of a testator may be admitted to prove or disprove revocation, see, ante, §§ 124, 125, 126.

The rule is well settled that to establish an oral contract to will property the proof must be clear, unequivocal and definite, and that the acts said to constitute performance should be equally clear and definite and referable exclusively to the contract. — Stennett v. Stennett,

(Iowa) 156 N. W. 406. See, also, Price v. Wallace, 224 Fed. 576; Black v. Hill, 117 Ark. 228, 174 S. W. 526; Blanc v. Connor, 167 Cal. 719, 141 Pac. 217; Collar v. Patterson, 137 Ill. 403, 27 N. E. 604; Bevington v. Bevington, 133 Iowa 351, 12 Ann. Cas. 490, 9 L. R. A. (N. S.) 508, 110 N. W. 840; Boeck v. Milke, 141 Iowa 713, 118 N. W. 874, 120 N. W. 120; Newton's Exr. v. Field, 98 Ky. 186, 32 S. W. 623; In re McMillan's Estate, 167 App. Div. 817, 153 N. Y. Supp. 400; Lasher v. McDermott, 91 Misc. Rep. 305, 154 N. Y. Supp. 798; Rosseau v. Rouss, 180 N. Y. 116, 72 N. E. 916; Taylor v. Higgs, 202 N. Y. 65, 95 N. E. 30; Dyess v. Rowe, (Tex. Civ.) 177 S. W. 1001.

It has been held that "the bare statement that she would be provided for or remembered in the will of the testatrix would not justify the conclusion that the testatrix made a contract by which she would make a devise equivalent to the value of the services of the appellee and, having failed to do so, the courts of the country should make provision for her out of the testatrix's estate."—Newton's Exr. v. Field, 98 Ky. 186, 32 S. W. 623.

¹⁰ Jilson v. Gilbert, 26 Wis. 637, 7 Am. Rep. 100; Silverthorn v. Wylie, 96 Wis. 69, 71 N. W. 107.

By such an agreement the promisor insures to himself the personal use and enjoyment of his property during his life, and the promisee is reimbursed for his services only in the event of the promisor leaving an estate at the time of his death. The promisor certainly derives benefit and advantage by such an agreement, which is sufficient to support his promise.¹¹ Thus an oral contract, based upon a valid consideration, to leave to the promisee a legacy of personal property is valid and enforceable.¹²

§ 141. Compensation for Services Rendered Can Be Recovered.

Where a party for a valuable consideration or for services to be rendered agrees to make a will for the benefit of another and dies without doing so, the promisee can recover the consideration advanced or the value of the services.¹³ If the consideration was service and the amount of money to be bequeathed by will was fixed, recovery is limited to that amount; but if the amount was indefinite or uncertain then the party is entitled to recover for the reasonable value of services rendered. The same rule applies where money has been advanced to

¹¹ *Murtha v. Donohoo*, 149 Wis. 481, 134 N. W. 406, 136 N. W. 158.

¹² *Banks v. Howard*, 117 Ga. 94, 43 S. E. 438; *Jordan v. Abney*, 97 Tex. 296, 78 S. W. 486; *Jilson v. Gilbert*, 26 Wis. 637, 7 Am. Rep. 100; *Slater v. Estate of Cook*, 93 Wis. 104, 67 N. W. 15.

"The surrender by the mother of all control of a child and the services and companionship of the latter, constituted valuable considerations for the promise of B. and his wife that she should have and inherit from the estate of said

parties . . . in the same manner and to the same extent as a child born of their union would inherit." The sundering of natural ties brings about changed conditions so that no court can restore the parties to their original situation; therefore the contract should be enforced.—*Healey v. Simpson*, 113 Mo. 340, 20 S. W. 881.

¹³ *Frost v. Tarr*, 53 Ind. 390; *Martin v. Wright's Admr.*, 13 Wend. (N. Y.) 460, 28 Am. Dec. 468; *Rice v. Hartman*, 84 Va. 251, 4 S. E. 621.

the promisor at his request; if the promise was to bequeath an amount certain, that amount can be recovered, otherwise the amount actually expended, with interest.¹⁴ Thus if a specific sum of money was to be bequeathed for services to be rendered, if the promisee fully performed his obligation and the promisor died without having made the bequest as agreed, an action would lie against the executors of the decedent's estate to recover the specified amount, on an implied *assumpsit* for work and labor performed.¹⁵ It has been held, however, that where services have been rendered under an agreement that specific property should be conveyed by will, if there is a breach of contract the amount that can be recovered does not depend upon the value of the particular property agreed to be willed, but the measure of damages is the value of the services without reference to the value of the estate.¹⁶ Should the agreement to compensate for labor performed or money paid by a devise of real property be oral and unenforceable because of the Statute of Frauds, the action can not be upon the contract, but would be for the money advanced with interest, or a *quantum meruit* to recover the value of the services.¹⁷

¹⁴ Hursey v. Surles, 91 S. C. 284, 74 S. E. 618; Murtha v. Donohoo, 149 Wis. 481, 134 N. W. 406, 136 N. W. 158.

¹⁵ Bell v. Hewitt's Exrs., 24 Ind. 280; Jacobson v. Exrs. of La Grange, 3 Johns. (N. Y.) 199; Patterson v. Patterson, 13 Johns. (N. Y.) 379.

¹⁶ Wallace v. Long, 105 Ind. 522, 55 Am. Rep. 222, 5 N. E. 666.

¹⁷ Hudson v. Hudson, 87 Ga. 678, 27 Am. St. Rep. 270, 13 S. E. 583; Banks v. Howard, 117 Ga. 94, 43

S. E. 438; Wallace v. Long, 105 Ind. 522, 55 Am. Rep. 222, 5 N. E. 666; Ham v. Goodrich, 37 N. H. 185; Emery v. Smith, 46 N. H. 151; Stone v. Todd, 49 N. J. L. 274, 8 Atl. 300. See, also, as to recovery of the value of services rendered: Welch v. Lawson, 32 Miss. 170, 66 Am. Dec. 606; Jacobson v. Exrs. of La Grange, 3 Johns. (N. Y.) 199; Campbell v. Campbell, 65 Barb. (N. Y.) 639; Robinson v. Raynor, 28 N. Y. 494; Reynolds v. Robinson, 64 N. Y. 589.

§ 142. Compensation for Services: What Can Be Recovered.

Should one party agree to live with and care for another until his death upon the promise of the other to make a testamentary disposition in his favor of all his real and personal property, the uncertainty of life and the length of the time that services are to be rendered, and the like, preclude the idea that either of the contracting parties could have had in mind any standard by which the pecuniary value of such services could be determined at the time when the agreement is made. There would also be the further uncertainty as to the amount of property which would remain at the testator's death, since the longer he should live naturally the less property he would have, while at the same time the greater the service to be rendered. If such an agreement were in parol, should the promisor die without making his will as agreed, the party rendering services would have a right of action against the estate of the deceased for the value of such services, and the amount to be recovered would not depend upon nor be gauged by the value of the property.¹⁸

§ 143. Promise to Compensate for Services by Will Not Invalidated by Quick Death of Promisor.

A valid contract to devise property existing, it can be enforced even should the promisor live but a short time after the agreement had been made and although the consideration for the promise had been services to be rendered. It is sufficient if the promisee had in good faith undertaken to perform and had done everything required of him. The possibility of loss or gain is assumed by each party.¹⁹

¹⁸ *Lisk v. Sherman*, 25 Barb. (N. Y.) 433.

¹⁹ *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415.

§ 144. No Right of Action for Compensation for Services Until After Death of Promisor.

Where a party has promised to make a bequest of specific personal property in consideration of services to be rendered him up to the time of his death, he can not relieve himself of liability by wrongfully discharging the promisee, and in case of a wrongful discharge the party rendering services is not limited to the amount promised but has a right of action as in a simple case of breach of contract.²⁰ No action, however, can be brought prior to the death of the promisor except there has been a breach of contract on his part.²¹ The right of action is based upon the breach of contract, and should the agreement be that the promisee was to be devised certain property which would vest after the death of some third person, the right of action would arise upon the death of the promisor, he failing to make the devise, although the right to the property under the agreement was to have vested at a later date.²² But the promisee has no right of action during the life of the promisor unless there is shown full performance on the part of the former or a legal excuse for non-performance. If a promisee voluntarily fails to fulfill the obligation which he has assumed, he has no remedy against the other during his life or against his estate after his death.²³

²⁰ *Parker v. Russell*, 133 Mass. 74; *Paige v. Barrett*, 151 Mass. 67, 23 N. E. 725; *Edwards v. Slate*, 184 Mass. 317, 68 N. E. 342.

²¹ *Patterson v. Patterson*, 13 Johns. (N. Y.) 379.

²² *Lipe v. Houck*, 128 N. C. 115, 38 S. E. 297.

²³ *Ducker v. Cochrane*, 92 N. C. 597; *Tussey v. Owen*, 139 N. C. 457, 52 S. E. 128.

§ 145. Acceptance of Other Gifts by Promisee May Waive His Rights Under the Agreement.

The fact that the promisor, during his life, had made gifts to the promisee, may be offered in evidence in an action by the promisee against the estate of the other, to recover the value of services rendered under an agreement to compensate for the same by last will and testament. Such transfers to the promisee are *prima facie* proof of payment for the value of the services and such evidence may properly be submitted to the jury.²⁴ Or in a case where one party had contracted to make a specific devise upon a certain named condition, but thereafter made a will which contained a provision for the benefit of the promisee different from that contracted for but which was evidently intended to take the place of the devise promised, an acceptance of the benefits of the devise under the will waives all rights under the contract.²⁵

§ 146. Equity Enforces an Agreement to Will Property by Charging It With a Trust.

Strictly speaking, an agreement to devise real estate or other property in consideration of services to be rendered, or for any other valid consideration, can not be specifically enforced. The agreement can not be enforced during the life-time of the party who is to make the will because a will is revocable and can not become operative until the maker's death, and the agreement can not be specifically enforced after his death because the party has ceased to have the power to make a will. Equity,

²⁴ In *re Williams' Estate*, 106 Mich. 490, 64 N. W. 490; In *re McNamara's Estate*, 148 Mich. 346, 111 N. W. 1066.

²⁵ *Davis v. Hendricks*, 99 Mo. 478, 12 S. W. 887; *Towle v. Towle*, 79 Wis. 596, 48 N. W. 800.

however, effects the same end by compelling those who derive title to the property through the estate of the decedent to convey or deliver it in accordance with the terms of the agreement. The principle underlying such cases is that the property is charged with a trust in the hands of the heirs-at-law, devisees, or purchasers with notice.²⁶ Thus where one party has agreed to dispose of specific property by will to another for a valid consideration, equity will fasten a trust upon the property in favor of the promisee which he may follow into the hands of the heirs-at-law or devisees of the promisor, or grantees without consideration or with notice.²⁷

§ 147. Specific Performance: An Exception to the Rule That Contracts Should Be Mutual.

The general rule is that contracts can not be specifically enforced unless they are mutual and one person would not have the power to compel the other to render him

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| <p>²⁶ <i>Randall v. Willis</i>, 5 Ves. Jun. 262; <i>Fortescue v. Hennah</i>, 19 Ves. Jun. 67; <i>Jaffee v. Jacobson</i>, 48 Fed. 21, 14 L. R. A. 352, 1 C. C. A. 11; <i>Black v. Hill</i>, 117 Ark. 228, 174 S. W. 526; <i>Morrison v. Land</i>, 169 Cal. 580, 147 Pac. 259; <i>Oles v. Wilson</i>, 57 Colo. 246, 141 Pac. 489; <i>Chehak v. Battles</i>, 133 Iowa 107, 12 Ann. Cas. 140, 8 L. R. A. (N. S.) 1130, 110 N. W. 330; <i>Baker v. Syfritt</i>, 147 Iowa 49, 125 N. W. 998; <i>Skinner v. Rasche</i>, 165 Ky. 108, 176 S. W. 942; <i>In re Williams' Estate</i>, 106 Mich. 490, 64 N. W. 490; <i>Newton v. Newton</i>, 46 Minn. 33, 48 N. W. 450; <i>Haubrich v. Haubrich</i>, 118 Minn. 394, 136 N. W. 1025; <i>Healey v. Simpson</i>,</p> | <p>113 Mo. 340, 20 S. W. 881; <i>Teske v. Dittberner</i>, 70 Neb. 544, 113 Am. St. Rep. 802, 98 N. W. 57; <i>Lacey v. Zeigler</i>, 98 Neb. 380, 152 N. W. 792; <i>Brinker v. Brinker</i>, 7 Pa. St. 53; <i>Logan v. McGinnis</i>, 12 Pa. St. 27; <i>Turnipseed v. Sirrine</i>, 57 S. C. 559, 76 Am. St. Rep. 580, 35 S. E. 757; <i>Larrabee v. Porter</i>, (Tex. Civ.) 166 S. W. 395; <i>Dyess v. Rowe</i>, (Tex. Civ.) 177 S. W. 1001; <i>Burdine v. Burdine's Exr.</i>, 98 Va. 515, 81 Am. St. Rep. 741, 36 S. E. 992.</p> <p>²⁷ <i>Allen v. Bromberg</i>, 147 Ala. 317, 41 So. 771; <i>Owens v. McNally</i>, 113 Cal. 444, 33 L. R. A. 369, 45 Pac. 710; <i>Baker v. Syfritt</i>, 147 Iowa 49, 61, 125 N. W. 998; <i>Howe</i></p> |
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services; but there are exceptions, as where by the nature of the contract the time for specific performance does not arise until after the contract has been fully performed by the one seeking to enforce it.²⁸ The same principles apply in a case where one party induces another to bequeath him certain property by reason of his promise, express or implied, that the legacy shall be used for some specific purpose only, in which case a trust is created and equity will compel the legatee to apply the property as promised.²⁹

§ 148. The Promisor Is Merely Restricted to the Reasonable Use of the Property Agreed to Be Willed to Another.

The fact that a person has agreed, for a valid consideration, to bequeath and devise all of the property owned by him at the time of his death, does not prevent the promisor from making gifts of his property during his lifetime. Such gifts, however, must not be made for the purpose of defeating the agreement; but gifts which are reasonable, absolute, bona fide and not testamentary in effect, may be made.³⁰ For instance, if a person promises to will one-half of the estate owned by him at the time of

v. Watson, 179 Mass. 30, 60 N. E. 415; *Van Duyne v. Vreeland*, 12 N. J. Eq. 142; *Kastell v. Hillman*, 53 N. J. Eq. 49, 30 Atl. 535; *Duvale v. Duvale*, 54 N. J. Eq. 581, 35 Atl. 750; *Bruce v. Moon*, 57 S. C. 60, 35 S. E. 415.

²⁸ *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415.

²⁹ *Amherst College Trustees v. Ritch*, 151 N. Y. 282, 37 L. R. A. 305, 45 N. E. 876. In *Taylor v. Mitchell*, 87 Pa. St. 518, 30 Am.

Rep. 383, it was held that an agreement under seal not to interfere with the rights of certain persons by devise or otherwise, founded upon a sufficient consideration, where the promisor afterward died leaving his property by will to others, was sufficient foundation upon which to base an action of ejectment.

³⁰ *Skinner v. Rasche*, 165 Ky. 108, 176 S. W. 942; *Dickinson v. Seaman*, 193 N. Y. 18, 20 L. R. A.

his death and thereafter makes a deed of gift to another in which he reserves a life interest to himself, such gift will be regarded in the nature of a testamentary disposition in order to protect the promisee.³¹ Equity interposes where the gift or transfer was made for the purpose of defrauding the promisee of the property which should go to him under the contract, the weight of authority being that an agreement to will all the property he possesses at his death at the most restricts the promisor to its reasonable use.³²

§ 149. Probate Court Has No Jurisdiction to Enforce Agreements to Devise Property.

Where a party for a valid consideration has agreed to make a specific devise in his last will and testament in favor of another person and dies without having done so, but has made a different will, this last will can not be refused probate. The probate court has no jurisdiction to determine or enforce agreements to make wills. Equity, however, will declare the executor or devisees under the will to be trustees for the performance of the testator's agreement, and it is therefore necessary that such will, though not in conformity with the provisions of

(N. S.) 1154, 85 N. E. 818; *Quinn v. Quinn*, 5 S. D. 328, 49 *Am. St. Rep.* 875, 58 N. W. 808.

³¹ *Fortescue v. Hennah*, 19 *Ves. Jun.* 67; *Rogers v. Schlottback*, 167 *Cal.* 35, 138 *Pac.* 728; *Johnson v. Hubbell*, 10 *N. J. Eq.* 332, 66 *Am. Dec.* 773.

³² *Austin v. Davis*, 128 *Ind.* 472, 25 *Am. St. Rep.* 456, 12 *L. R. A.* 120, 26 *N. E.* 890.

In *Logan v. Weinhold*, 7 *Bligh* (N. S.) 1, it was held that a gift,

the promisor retaining an interest for life in order to defeat the promisee, was testamentary.

In *VanDuyne v. Vreeland*, 12 *N. J. Eq.* 142, it was held that the promisor could have the unrestricted use of and could give away the property; but could make no testamentary disposition thereof different from the agreement.

To the same effect: *Skinner v. Rasche*, 165 *Ky.* 108, 176 *S. W.* 942; *Dickinson v. Seaman*, 193

the agreement, be admitted to probate.³³ Thus an action to compel specific performance of a contract to devise real or personal property possessed at death, made upon a sufficient consideration or for services fully rendered, must be brought in a court of equity.³⁴ The consent of all parties is not sufficient to confer such jurisdiction on the probate court.³⁵

§ 150. Statute of Limitations: Time When It Commences to Run.

The statute of limitations does not commence to run against a promise to make a devise in consideration of services to be rendered until after the death of the promisor. Even though the promisor had wrongfully terminated the contract and refused to accept the services, yet if he should make a will according to the agreement, there would be no breach. The promise on his part was to make a will which he might do up to the last moment of his life, and prior to that time there would be no breach of contract on his part.³⁶

N. Y. 18, 20 L. R. A. (N. S.) 1154, 85 N. E. 818; *Bruce v. Moon*, 57 S. C. 60, 35 S. E. 415.

³³ *Bolman v. Overall*, 80 Ala. 451, 60 Am. Rep. 107, 2 So. 624; *Allen v. Bromberg*, 147 Ala. 317, 41 So. 771; *In re Burke's Estate*, 66 Or. 252, 134 Pac. 11.

³⁴ *Hull v. Hull*, 122 Mich. 338, 81 N. W. 89; *Hull v. Hull*, 149 Mich. 500, 112 N. W. 1126; *Svanburg v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490, 43 L. R. A. 427, 78 N. W. 4; *Stellmacher v. Bruder*, 89 Minn. 507, 99 Am. St. Rep. 609, 95 N. W. 324; *Wright v. Tinsley*, 30 Mo. 389; *Chubb v. Peck-*

ham, 13 N. J. Eq. 207; *Rivers v. Exrs. of Rivers*, 3 Desaus. (S. C.) 190, 4 Am. Dec. 609.

³⁵ *Hull v. Hull*, 149 Mich. 500, 112 N. W. 1126.

³⁶ *Thompson v. Orena*, 134 Cal. 26, 66 Pac. 24; *Rogers v. Schlottback*, 167 Cal. 35, 138 Pac. 728; *In re Funk's Estate*, 49 Misc. Rep. 199, 98 N. Y. Supp. 934; *Wyche v. Clapp*, 43 Tex. 543; *Stevens v. Lee*, 70 Tex. 279, 8 S. W. 40; *Jordan v. Abney*, 97 Tex. 296, 78 S. W. 486; *Dyess v. Rowe*, (Tex. Civ.) 177 S. W. 1001; *Waddell v. Waddell*, (Tenn. Ch.) 42 S. W. 46.

§ 151. Statute of Frauds Does Not Apply to Oral Agreements to Bequeath Personalty.

Oral agreements to bequeath personal property are not within the Statute of Frauds, as the statute includes only those contracts which by their terms are not to be performed within one year. Nor are they contracts for the sale of lands or goods. An agreement to bequeath personalty, the performance of which is naturally dependent upon the duration of human life, is not within the statute since it may be performed within one year. The party making the promise may die within the year and the agreement must be performed on his part during his lifetime.³⁷ Such contracts are essentially different from those to devise all of one's property, both real and personal, which would be within the Statute of Frauds.³⁸

§ 152. Oral Agreements to Devise Realty are Void Under Statute of Frauds.

An executory oral agreement between two parties whereby each is to will to the other his property, real and personal, or whereby one is to will to the other his

³⁷ See, ante, §§ 100, 101, as to the effect of the Statute of Frauds on mutual or reciprocal wills of property. *Ridley v. Ridley*, 34 Beav. 478; *Anon.*, 1 Salk. 280; *Fenton v. Emblers*, 3 Burr. 1278; *Bell v. Hewitt's Exrs.*, 24 Ind. 280; *Sturgeon's Admr. v. McCorkle*, 163 Ky. 8, 173 S. W. 149; *Lyon v. King*, 11 Metc. (Mass.) 411, 45 Am. Dec. 219; *Worthy v. Jones*, 11 Gray (Mass.) 168, 71 Am. Dec. 696; *Peters v. Westborough*, 19 Pick. (Mass.) 364, 31 Am. Dec. 142; *Updike v. TenBroeck*, 32 N. J. L. 105;

Wellington v. Apthorp, 145 Mass. 69, 13 N. E. 10; *Jacobson v. Exrs. of La Grange*, 3 Johns. (N. Y.) 199; *Patterson v. Patterson*, 13 Johns. (N. Y.) 379; *Kent v. Kent*, 62 N. Y. 560, 20 Am. Rep. 502; *Jilson v. Gilbert*, 26 Wis. 637, 7 Am. Rep. 100.

Compare: *Izard v. Middleton*, 1 Desaus. (S. C.) 116, which was overruled in *Turnipseed v. Sirrine*, 57 S. C. 559, 76 Am. St. Rep. 580, 35 S. E. 757.

³⁸ *Gould v. Mansfield*, 103 Mass. 408, 4 Am. Rep. 573.

property, real and personal, is in effect a contract for the sale of lands and, in so far as it affects real property, is void under the Statute of Frauds.³⁹ Being void, it is generally held that it can not be specifically enforced, and it might be questioned whether such a contract has sufficient validity to support an action for damages unless the injured party was induced to enter into the contract and suffered because of fraud or bad faith.⁴⁰ The measure of damages in such a case would be the value of what had been paid by one party to the other, either in money or services, relying upon the agreement of the other, the other refusing to perform. One party would thus be holding money or would have received the benefit of the services rendered and would be bound to make restitution.⁴¹

§ 153. General Rule Is That Specific Performance of Oral Agreements to Devise Realty Will Be Denied.

The general rule is that specific performance of an oral agreement to devise land in consideration of services rendered will not be granted. Such agreements are merely engagements of honor, for the promisee could

³⁹ *Caton v. Caton*, L. R. 1 Ch. App. 137; *Mundorff v. Kilbourn*, 4 Md. 459; *Harder v. Harder*, 2 Sandf. Ch. (N. Y.) 17; *Izard v. Middleton*, 1 Desaus. (S. C.) 116.

In *Brinker v. Brinker*, 7 Pa. St. 53, it was held that the Statute of Frauds was no bar where the terms of the agreement had been incorporated in the will of the promisor, the will having been lost, but the substance of the devise was proved by parol. The court said the accidental inability of the

devisee to produce the document would not destroy his rights.

See, ante, §§ 100, 101, as to the effect of the Statute of Frauds on mutual or reciprocal wills of real property.

⁴⁰ *Barickman v. Kuykendall*, 6 Blackf. (Ind.) 21; *McCracken v. McCracken*, 88 N. C. 272; *Bender's Admrs. v. Bender*, 37 Pa. St. 419.

⁴¹ *Day v. Wilson*, 83 Ind. 463, 43 Am. Rep. 76. See *Barickman v. Kuykendall*, 6 Blackf. (Ind.) 21, to the effect that the action would

cease performing the labor at any time, and there was no original consideration for the promise.⁴² There are exceptions, however, to this rule, for equity will interpose to prevent fraud. For instance, it would be a virtual fraud for one to accept the benefit of services rendered him by another who obviously was relying upon an oral agreement that certain property would be devised him by will and where the benefit and labor have so changed the situation of the parties that it would be practically impossible to restore them to their former condition. It would be inequitable to allow one to receive the benefit of the labor of the other and then to allow such other merely the chance of being reimbursed through an action at law. Whether or not the agreement should be enforced is a matter addressed to the conscience of the chancellor and relief will not be granted unless by competent evidence it is shown that the contract is definite and certain and also unless it appears that the remedy is not unjust or oppressive to third parties and not against public policy.⁴³ Such a contract regarding lands can be established only by direct, positive and unambiguous evidence; there must have been a clear meeting of the minds of the contracting parties; disinterested witnesses must give evidence of the contract by having been present when it was made or by having heard the parties repeat it in each

be *indebitatus assumpsit*. See, also, *Maddison v. Alderson*, L. R. 8 App. Cas. 467; *Welch v. Lawson*, App. Cas. 467; *Welch v. Lawson*, 32 Miss. 170, 66 Am. Dec. 606; *Emery v. Smith*, 46 N. H. 151; *Jacobson v. Exrs. of La Grange*, 3 Johns. (N. Y.) 199; *Campbell v. Campbell*, 65 Barb. (N. Y.) 639; *Robinson v. Raynor*, 28 N. Y. 494;

Reynolds v. Robinson, 64 N. Y. 589; *Bender's Admr. v. Bender*, 37 Pa. St. 419.

⁴² *Carlisle v. Fleming*, 1 Harr. (Del.) 421.

⁴³ *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. Ed. 383, 16 Sup. Ct. 258. In *Bruce v. Moon*, 57 S. C. 60, 35 S. E. 415, the court sustained an agreement to devise real and personal property, and set

other's presence. Such an agreement can not be inferred from mere declarations.⁴⁴

§ 154. Exceptions to General Rule: When Specific Performance Will Be Granted.

There are other exceptions to the general rule. Where an oral agreement to devise land has been fully executed on the part of the promisee, the consideration for the promise having been services to be rendered and where such services were of such a peculiar domestic nature that it would be impossible to estimate their value by any pecuniary standard, specific performance will be decreed. Thus personal relationship may so enter into such an agreement as to make it evident that the contracting parties did not intend to place a monetary value upon such services, as where the agreement was that a minor should live with the promisor and render him service during his minority. However, if the value of the services can be estimated in money damages so that the party rendering them can be made whole, specific performance will be denied.⁴⁵

aside a deed made by the promisor prior to his death.

⁴⁴ Owens v. McNally, 113 Cal. 444, 33 L. R. A. 369, 45 Pac. 710; Rogers v. Schlotterback, 167 Cal. 35, 138 Pac. 728; Blanc v. Connor, 167 Cal. 719, 141 Pac. 217; Monsen v. Monsen, 174 Cal. 97, 162 Pac. 90; Ackerman v. Ackerman's Exrs., 24 N. J. Eq. 585, 586; Ackerman v. Fisher, 57 Pa. St. 457; Burgess v. Burgess, 109 Pa. St. 312, 1 Atl. 167.

⁴⁵ Owens v. McNally, 113 Cal. 444, 33 L. R. A. 369, 45 Pac. 710;

Svanburg v. Fosseen, 75 Minn. 350, 74 Am. St. Rep. 490, 43 L. R. A. 427, 78 N. W. 4; Laird v. Vila, 93 Minn. 45, 106 Am. St. Rep. 420, 100 N. W. 656; Van Duyne v. Vreeland, 12 N. J. Eq. 142; Rhodes v. Rhodes, 3 Sandf. Ch. (N. Y.) 279. But compare Carlisle v. Fleming, 1 Harr. (Del.) 421.

The rule in Tennessee, contrary to the weight of English and American authority, is that the full rendition of services by one to another under an oral agreement by the latter to devise real and personal property in consideration

§ 155. Part Performance May Remove the Bar of the Statute of Frauds.

The mere fact of part performance is not sufficient to take out of the Statute of Frauds an oral agreement to devise real property, for there is nothing about a mere agreement to devise which would prevent the general principles being applied to it as in the case of any other contract. If, however, there has been such performance on the part of the promisee so that the breach of the agreement on the part of the other would work a fraud, specific performance may be enforced. Specific performance, however, can not be demanded as a matter of right; relief will or will not be granted according to the circumstances surrounding the case, and specific performance will be denied if it would work a wrong or an injustice to third parties. Even though there has been such a part performance as will remove the bar of the Statute of Frauds, yet the right to grant or withhold specific performance rests in the discretion of the court, and will only be granted where the contract is definite and certain and where the remedy prayed for is not oppressive or unjust to innocent third persons or against public policy.⁴⁶

§ 156. Part Performance—Instances of, as Affected by the Statute of Frauds.

There is much dispute as to what part performance is sufficient to take an oral contract to devise lands out of the Statute of Frauds. A man may have agreed with a woman, previous to their marriage, that he will thereafter

of such services, is not such part performance as to take the agreement out of the Statute of Frauds. See *Patton v. McClure*, Mart. &

Y. (8 Tenn.) 333; *Goodloe v. Goodloe*, 116 Tenn. 252, 8 Ann. Cas. 112, 6 L. R. A. (N. S.) 703, 92 S. W. 767. ⁴⁶ *Owens v. McNally*, 113 Cal.

make a will containing certain provisions in her favor, but if he subsequently makes a different will, the fact of marriage in itself is not such part performance as will remove the ban of the statute.⁴⁷ The adoption of a child under an oral agreement to make no will which would deprive the one adopted of his share in the estate of the parent by adoption, has been held to be not such part performance as will take the case out of the statute.⁴⁸ But the better rule is that if one adopts a minor under an oral agreement to leave his property, or a certain portion thereof, by will to the adopted child, and the one adopted lives for years with the promisor, yielding to him all the duties of a natural child, it would be a fraud for the parent by adoption to make a testamentary disposition of his property contrary to the agreement. In such a case equity should interpose and grant relief. It must be borne in mind, however, that such agreement can not be enforced against an innocent purchaser of the property and for value, but only against the estate or the devisees of the deceased, or grantees without value or with notice.⁴⁹

Or where two persons mutually agree to make wills devising real property to each other, the execution by one of his will according to the understanding is not part

444, 33 L. R. A. 369, 45 Pac. 710; Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773.

⁴⁷ Gould v. Mansfield, 103 Mass. 408, 4 Am. Rep. 573. As to part performance taking oral contracts to devise out of the Statute of Frauds, see: Warren v. Warren, 105 Ill. 568; Watson v. Mahan, 20 Ind. 223; Twiss v. George, 33 Mich.

253; Gupton v. Gupton, 47 Mo. 37; Sutton v. Hayden, 62 Mo. 101; Van Duyne v. Vreeland, 12 N. J. Eq. 142; Patterson v. Patterson, 13 Johns. (N. Y.) 379.

⁴⁸ Dicken v. McKinley, 163 Ill. 318, 54 Am. St. Rep. 471, 45 N. E. 134.

⁴⁹ Van Duyne v. Vreeland, 12 N. J. Eq. 142.

performance, for the party has the right of revocation.⁵⁰ If, however, there was a consideration for the promise or a detriment suffered, as where a man agreed prior to marriage to make, after marriage, a suitable provision for his wife by will if she would renounce her dower rights, which she did, the agreement would be enforceable. A man may renounce his right to make his will except in a particular manner and if based upon a sufficient consideration and his breach of agreement would be a fraud, equity will interpose and grant relief.⁵¹

§ 157. Possession of the Property as Affecting the Statute of Frauds.

The mere payment of a money consideration is not sufficient to take an oral contract to devise lands out of the Statute of Frauds,⁵² yet it seems well settled that such payment when followed by the taking of the possession of the lands by the promisee and the making of improvements thereon, is such evidence of part performance as will entitle the promisee to have the agreement specifically enforced.⁵³ Possession is, in itself, some evi-

⁵⁰ *Izard v. Middleton*, 1 Desaus. (S. C.) 116. But compare *Turnipseed v. Sirrine*, 57 S. C. 559, 76 Am. St. Rep. 580, 35 S. E. 757.

⁵¹ *Goilmere v. Battison*, 1 Vernon 48; *Brinker v. Brinker*, 7 Pa. St. 53; *Rivers v. Rivers's Exrs.*, 3 Desaus. (S. C.) 190, 4 Am. Dec. 609.

In *Brandes v. Brandes*, 129 Iowa 351, 105 N. W. 499, the agreement was that one party was to render services and care for a husband and wife in consideration of having devised to him certain real

property. The husband died and left a will containing the agreed devise. The wife objected, claiming dower rights in the property. The promisee had not fully completed the agreement, but through no fault on his part. It was held that the widow had relinquished her dower rights in the land.

⁵² *Kelly v. Kelly*, 54 Mich. 30, 19 N. W. 580; *Grindling v. Rehyl*, 149 Mich. 641, 15 L. R. A. (N. S.) 466, 113 N. W. 290.

⁵³ *Wills v. Stradling*, 3 Ves. Jun. 378; *Munddy v. Jolliffe*, 5 My. &

dence of ownership, and although a contract to devise lands may rest in parol, yet if one of the parties is put into the complete possession of the property pursuant to the agreement and otherwise fully performs the contract on his part, such part performance and possession will take the contract out of the statute.⁵⁴

§ 158. What Description of the Property Is Necessary.

There is no reason why an agreement to devise real property should be more specific as to the description than is required with respect to a deed or a mortgage. A devise of all or any aliquot part of the real estate of which the testator died seized would not be open to serious objection and the description in the agreement need not be more complete.⁵⁵

Cr. 167; Williams v. Evans, L. R. 19 Eq. 547; Brown v. Sutton, 129 U. S. 238, 32 L. Ed. 664, 9 Sup. Ct. 273; Townsend v. Vanderwerker, 160 U. S. 171, 40 L. Ed. 383, 16 Sup. Ct. 258; Owens v. McNally, 113 Cal. 444, 33 L. R. A. 369, 45 Pac. 710; Smith v. Pierce, 65 Vt. 200, 25 Atl. 1092.

⁵⁴ Moreland v. Lemasters, 4 Blackf. (Ind.) 383; Lee v. Carter, 52 Ind. 342; Mauck v. Melton, 64 Ind. 414; Wallace v. Long, 105 Ind.

522, 55 Am. Rep. 222, 5 N. E. 666; Smith v. Pierce, 65 Vt. 200, 25 Atl. 1092. But see contra: Kelsey v. McDonald, 76 Mich. 188, 42 N. W. 1103; Riddell v. Riddell, 70 Neb. 472, 97 N. W. 609.

⁵⁵ Wilson v. Boyce, 92 U. S. 320, 23 L. Ed. 608; Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 345; Jackson v. Delancey, 11 Johns. (N. Y.) 365; Pond v. Bergh, 10 Paige Ch. (N. Y.) 140.

CHAPTER IX.

NUNCUPATIVE WILLS.

- § 159. Definition of a nuncupative will.
- § 160. During the ages when the art of writing was comparatively unknown, oral wills of personalty were necessarily sanctioned.
- § 161. The early privileges conferred on those who could read and write.
- § 162. The law of nuncupative wills derived from the civil law.
- § 163. Definitions by early writers, of nuncupative wills.
- § 164. The early rule was that oral wills were allowed only when the testator was *in extremis*.
- § 165. Provisions of the Statute of Frauds regarding oral wills: Those of soldiers and sailors not affected.
- § 166. The same subject: Particular sections referred to.
- § 167. The same subject: The restrictions imposed caused the practical abolition of nuncupative wills.
- § 168. The Statute of Wills (A. D. 1837) as affecting oral testaments.
- § 169. In the United States, the law of nuncupative wills is variously founded on the Statute of Frauds or the Statute of Wills.
- § 170. Nuncupative wills operate only on personal property.
- § 171. Incomplete testamentary writings, prior to the Statute of Wills, were held effective as nuncupative wills of personalty.
- § 172. The same subject: Wills of soldiers and sailors, informally executed, may be admitted to probate.
- § 173. The terms "soldiers" and "seamen" include officers and all degrees.
- § 174. Question as to whether soldiers and seamen have an unqualified right to make nuncupative wills.

- § 175. Soldiers in actual military service are those on an expedition.
- § 176. When is a soldier on an expedition? Illustrations.
- § 177. The same subject.
- § 178. When does a military expedition begin or end?
- § 179. Mariners and seamen at sea.
- § 180. In some jurisdictions, any qualified person may, under certain restrictions, make a nuncupative will.
- § 181. Meaning of the term "last sickness"—*in extremis*.
- § 182. Necessity of calling others to witness the testament.
- § 183. Intention to make a will must be clearly established by disinterested witnesses.
- § 184. There must be strict compliance with the statutory requirements.
- § 185. Number of witnesses to nuncupative wills.
- § 186. Committing the spoken words to writing.
- § 187. Evidence of witnesses to oral testaments must substantially agree.
- § 188. A written will can not be revoked by one that is oral.
- § 189. Nuncupative wills of soldiers and sailors have been held valid although the testators had ceased their privileged callings.
- § 190. The same subject: Criticism of the rule.

§ 159. Definition of a Nuncupative Will.

A nuncupative will is defined to be an oral will declared in the presence of witnesses by a testator *in extremis*, or under circumstances considered equivalent thereto, and afterwards reduced to writing.¹

¹ 2 Bl. Com. *500; Read v. Phillips, 2 Phillim. 122; Nutt v. Nutt, 1 Freem. Ch. (Miss.) 128; Ex parte Henry, 24 Ala. 638; Brown v. Tilden, 5 Har. & J. (Md.) 371;

Devecmon v. Devecmon, 43 Md. 335; Watts v. Public Admr., 4 Wend. (N. Y.) 168; Gaskins v. Gaskins, 3 Ired. (25 N. C.) 158.

§ 160. During the Ages When the Art of Writing Was Comparatively Unknown, Oral Wills of Personalty Were Necessarily Sanctioned.

The popular conception of a will is that of a written instrument, duly subscribed and witnessed according to prescribed formalities. The ordinary will of today is required, among other things, to be in writing, subscribed by the maker, and attested by witnesses. These requisites, however, were not always, nor are they now, universally demanded. The common law is of ancient origin, and during its early development the art of writing was comparatively unknown. The law had to adapt itself to such conditions. During the ages of ignorance the only method of making a will was by words and signs, and as but few could write, the common law recognized a will of chattels as good without writing.²

§ 161. The Early Privileges Conferred on Those Who Could Read and Write.

The art of reading and writing was so rare an accomplishment in the early stages of the common law that it conferred great privileges and the person who possessed it was entitled, under the name of *benefit of clergy*, to an exemption from civil punishment. This privilege was curtailed in England by legislation from time to time. With the general dissemination of knowledge following the invention of printing, it was found that as many laymen as divines were admitted to the *privilegium clericale*, therefore the statute 4 Henry VIII, ch. 13, drew a distinction between lay scholars and clerks in holy orders, subjecting the former to a slight degree of punishment

24 Kent Com. *516; Hubbard v. Hubbard, 12 Barb. (N. Y.) 148.

and prohibiting them from receiving the benefit of clerical privileges more than once. This distinction between scholars in and out of orders was abolished by the statutes 28 Henry VIII, ch. 1, and 32 Henry VIII, ch. 3, but was practically restored by the statute 1 Edw. VI, ch. 12.³ Later it was deemed that education was not an extenuating circumstance to be urged by the guilty, but was rather the reverse, and by the statute 5 Anne, ch. 6, the lay scholar was deprived of any advantage over the ignorant.⁴

§ 162. The Law of Nuncupative Wills Derived from the Civil Law.

The doctrine in relation to nuncupative wills is in fact derived from the civil law, and is of very ancient origin. We find the following in the laws of Justinian: "If a man wishes to dispose of his effects, by a nuncupative or unwritten testament, he may do so, if, in the presence of seven witnesses, he verbally declares his will; and this will be a valid testament, according to the civil law."⁵ It appears that neither last sickness, nor any sickness, was necessary to give it validity; it was sufficient if the witnesses, within a reasonable time after the death of the testator, went before a magistrate and gave an account of what had taken place and a formal statement was drawn up and signed.

³ 4 Bl. Com. *367; *State v. Bilansky*, 3 Minn. 246.

⁴ 4 Bl. Com. *370; *State v. Bilansky*, 3 Minn. 246.

People have now become so familiar with the use of the pen that oral testaments are looked

upon with disfavor, since they are likely to be the subjects of fraud, perjury, mistake or misrecollections.—*Leathers v. Greenacre*, 53 Me. 561.

⁵ Inst. Just., lib. 2, tit. 10, § 14.

§ 163. Definitions by Early Writers, of Nuncupative Wills.

In Bacon's Abridgment, first published in 1736, taking the definition of a nuncupative will as laid down by Perkins, whose work was published under Henry VIII, we find it to be "by word, or without writing, which is, where a man is sick, and for fear that death, or want of memory or speech, should surprise him, that he should be prevented, if he stayed the writing of his testament, desires his neighbors and friends to bear witness of his last will, and then declares the same presently before them; and this is called a *nuncupative* or *nuncupatory* will or testament; and this being after his death proved by witnesses, and then put in writing by the ordinary, is of as great force, for any other thing, but land, as when at the first in the life of the testator it is put in writing."⁶ Perkins also says in his work (§ 476) that a nuncupative will is proper when the testator "lieth languishing for fear of sudden death, dareth not to stay the writing of his testament, and, therefore, he prayeth his curate, and others, his neighbors, to bear witness to his last will, and declareth by word what his will is."

Swinburne, whose treatise was published in the time of James I, says this kind of a testament is commonly made when the testator is now very sick, weak, and past all hope of recovery. Further, in defining such testaments, he says: "A nuncupative testament is, when the testator without any writing doth declare his will before a sufficient number of witnesses. It is called *nuncupative* because when a man maketh a nuncupative testament, he must name his executor, and declare his whole mind before witnesses."⁷ He also says: "In the making of a nuncupative will or testament, this is chiefly to be ob-

⁶ 7 Bac. Abr. by Gwyllim 305, ⁷ Swinburne, Wills, pt. 1, § 12.
Bouvier's ed., tit. Wills, D.

served, that the testator do name his executor, and declare his mind by words of mouth, without writing, before witnesses. As for any precise form of words, none is required, . . . so that the testator's meaning do appear.”⁸ He further says: “It is received for an opinion, amongst the ruder and more ignorant people, that if a man should be so wise as to make a will in health, . . . that then surely he should not live long after; and therefore they defer it until such time, when it were more convenient to apply themselves to the disposing of their souls, than of their lands and goods.”⁹

§ 164. The Early Rule Was That Oral Wills Were Allowed Only When the Testator Was In Extremis.

Although prior to the Statute of Frauds (A. D. 1677) there was no law which prescribed that wills of chattels without writing could be made only when the testator was *in extremis*, yet it appears well settled that nuncupative wills were allowed only in extreme cases. During the reigns of Henry VIII, Elizabeth and James I, the art of reading and writing had become so widely diffused that they were limited to those cases where the “testator was very sick, weak and past all hope of recovery” and where time did not exist for the making of a will in writing, “necessity being the justification of the oral testament.”¹⁰

§ 165. Provisions of the Statute of Frauds Regarding Oral Wills: Those of Soldiers and Sailors Not Affected.

Opportunities for fraud were opened because of nuncupative wills and codicils, and abuses and perjuries

⁸ Swinburne, Wills, pt. 4, § 29.

¹⁰ 4 Kent Com. *516, *517; Prince

⁹ Swinburne, Wills, pt. 1, § 12.

v. Hazleton, 20 Johns. (N. Y.) 502,

were committed.¹¹ Therefore the Statute of Frauds, 29 Chas. II, A. D. 1677, placed many restrictions upon oral testaments.¹² Sections nineteen to twenty-three inclusive of this act related to nuncupative wills, but by the last named section, any soldier in actual military service, or any mariner or seaman at sea, could dispose of his movables, wages and personal estate the same as before the act. As to all other persons the statute made specific provisions. Section nineteen enacted: "No nuncupative will shall be good where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oath of three witnesses,¹³ at the least, that were present at the making thereof, and bid by the testator to bear witness that such was his will, or to that effect." By the statute of 4 Ann., ch. 16, § 14, it was declared: "That all such witnesses as are and ought to be allowed to be good witnesses upon trial at law, by the laws and customs of this realm, shall be deemed good witnesses to prove any nuncupative will, or anything relating thereto."

§ 166. The Same Subject: Particular Sections Referred To.

Section nineteen of the Statute of Frauds provided that no oral testament—not referring to the wills of soldiers and sailors—should be good except as follows: "Unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath

¹¹ Am. Dec. 307; Harp v. Adams, 142 Ga. 5, 82 S. E. 246.

¹¹ Cole v. Mordaunt, cited in 4 Ves. Jun. 196, decided in the 28th year of Charles II, one year before the Statute of Frauds.

¹² 4 Kent Com. *517; 2 Bl. Com. *500.

¹³ The civil law required seven witnesses.—Inst. Just., lib. 2, tit. 10, § 14; 2 Bl. Com. *500.

been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling." Section twenty provided as to nuncupative wills other than those of soldiers and sailors: "That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will." Section twenty-one enacted: "That no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court, till fourteen days, at the least, after the decease of the testator be fully expired, nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or the next of kindred of the deceased, to the end that they may contest the same, if they please."

§ 167. The Same Subject: The Restrictions Imposed Caused the Practical Abolition of Nuncupative Wills.

Nuncupative wills were not prohibited by the Statute of Frauds, and as to soldiers in actual military service and mariners and seamen at sea, the act had no application. The statute did, however, surround oral testaments with so many restrictions as to cause their use to be practically abolished. Blackstone, after reviewing the foregoing provisions of the statute, says: "Thus hath the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself has fallen into disuse; and is hardly ever heard of, but in the only instance where

favor ought to be shewn to it, when the testator is surprised by sudden and violent illness.”¹⁴

§ 168. The Statute of Wills (A. D. 1837) as Affecting Oral Testaments.

In the year A. D. 1837, long after the independence of these United States, there was passed in England an act for the amendment of the laws with respect to wills. This statute enacted that no will should be valid unless it was in writing and executed according to the formalities prescribed, this having reference to both real and personal property, but soldiers in actual military service and mariners and seamen at sea were excepted, they being allowed to dispose of their personal estates as they might have done prior to the statute.¹⁵

§ 169. In the United States, the Law of Nuncupative Wills Is Variousl Founded on the Statute of Frauds or the Statute of Wills.

In some of the states the law relative to nuncupative wills is based on the Statute of Frauds, in others upon the Statute of Wills enacted in the first year of the reign of Queen Victoria, and in all instances it is necessary

¹⁴ 2 Bl. Com. *501.

¹⁵ 1 Vict., ch. 26, §§ 9, 11. The Statute of Frauds, 29 Car. II, ch. 3, passed A. D. 1677, in sections 5, 6, 12, 19, 20, 21, 22 and 23, dealt with the subject of wills and the due execution thereof, sections 19 to 23 inclusive relating to nuncupative wills. So much of the Statute of Frauds as related to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands,

tenements or hereditaments, or any clause thereof, or to the devise of any estate per autrie vie, or to nuncupative wills, or to the repeal, altering or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise or bequest therein, was repealed by the Wills Act of 1837, 1 Vict., ch. 26. Section 11 of the last mentioned act, however, was as follows: “Provided always, and be it further enacted, that any

that the statutes of the various jurisdictions be referred to. In some of the states oral testaments are allowed in no instances except when made by soldiers in actual military service and mariners and seamen at sea. Massachusetts and New York are two examples, yet the original rule in New York was that based on the Statute of Frauds which had been almost literally adopted in that state, but has since been changed.¹⁶ In other jurisdictions oral testaments, in addition to those of the privileged classes of soldiers and sailors, may be made under varying conditions. While there is a general resemblance in the statutes of such jurisdictions, some practically copying the acts of another, yet there are slight differences in so many instances that it is impossible, without setting forth the numerous statutes at length, to do more than give a general summary. The principles involved, however, are the matters of importance and those will be dealt with rather than the particular wording of the various acts. In most jurisdictions nuncupative wills can be made only during the last sickness of the testator and in his own home unless he be taken suddenly ill while absent therefrom and die before his return. Oral testaments are also required to be witnessed by two or more competent persons who are called by the testator to his presence to

soldier being in actual military service, or any mariner, or seamen being at sea, may dispose of his personal estate as he might have done before the making of this act."

¹⁶ Prince v. Hazleton, 20 Johns. (N. Y.) 502, 11 Am. Dec. 307; Hubbard v. Hubbard, 12 Barb. (N. Y.) 148; Ex parte Thompson, 4 Bradf. (N. Y.) 154. In Louisiana the

code provides for nuncupative testaments either by public act, or by act under private signature, but they are in writing and witnessed. The Louisiana Civil Code, arts. 1597-1604, refers to oral testaments of soldiers in the field and mariners and seamen at sea, being taken from the Code Napoleon, and in many instances being a literal copy.

bear witness to his will. The statutes generally provide that they must be reduced to writing within a specified time varying from three to sixty days, otherwise that they can not be proven after a lapse of six months from the date they were made. Other jurisdictions place a limit on the amount of the estate which can be thus orally bequeathed, running from thirty to one thousand dollars. If the amount bequeathed is greater than is allowed by the statute, the will is void only as to the excess.¹⁷

§ 170. Nuncupative Wills Operate Only on Personal Property.

In the opening chapters of this work it is shown how the power of devising real property disappeared under feudalism but was restored to a large extent by the statute of 32 Hen. VIII, ch. 1, explained by the statute of 34 Hen. VIII, ch. 5, such dispositions, however, being required to be in writing. After various changes there was enacted the Statute of Frauds, 29 Charles II, ch. 3, which required all devises of lands not only to be in writing, but to be subscribed by the testator and attested by witnesses. The Statute of Frauds did not require wills of personal property to be in writing, but imposed many restrictions on such bequests. This statute has been adopted, in one form or another, in practically every one of the United States and it may be said to be a universal rule that no transfer or devise of real property is valid unless the same be in writing. The English Statute of Wills of 1 Viet., ch. 26, required all wills to be in writing whether affecting real or personal property, with the exception of the testaments of soldiers in actual military service and mariners and seamen at sea, the classes just mentioned being al-

¹⁷ Mulligan v. Leonard, 46 Iowa 692.

lowed to dispose of their *personal estates* by oral testament as they might theretofore have done. This right was limited by the statute to personal property. In the various states, whether the law of wills has been founded upon the Statute of Frauds or the Statute of Wills of 1 Vict., ch. 26, it is the universal rule that an oral will of real property is invalid unless local statutes in special cases allow it to so operate;¹⁸ and where the statute declares that one may so dispose of property, the term is construed to extend to personalty only.¹⁹

§ 171. Incomplete Testamentary Writings, Prior to the Statute of Wills, Were Held Effective as Nuncupative Wills of Personalty.

Prior to the Statute of Wills of 1 Vict., ch. 26, and the American statutes, which require the same formalities in the execution and attestation of wills of personalty as in devises of realty, the courts allowed imperfectly executed testamentary writings to take effect as nuncupative dispositions of personalty, where it appeared that the testators intended them to operate in the form in which they were found, and that the failure to completely execute them arose from some reason other than a purpose to abandon.²⁰ Thus such writings have been held effective where execution was delayed merely from habits of pro-

¹⁸ 4 Kent Com. *503, *516; *Pierce v. Pierce*, 46 Ind. 86; *Palmer v. Palmer*, 2 Dana (Ky.) 390; *Maurer v. Reifschneider*, 89 Neb. 673, Ann. Cas. 1912C, 643, 132 N. W. 197; *Smith v. Smith*, 64 N. C. 52; *In re Garland's Will*, 160 N. C. 555, 76 S. E. 486; *Ashworth v. Carleton*, 12 Oh. St. 381.

¹⁹ *Maurer v. Reifschneider*, 89 Neb. 673, Ann. Cas. 1912C, 643, 132

N. W. 197; *Moffett v. Moffett*, 67 Tex. 647, 4 S. W. 70. As to the provisions of the Statute of Frauds, see, ante, §§ 165, 166.

²⁰ *Read v. Phillips*, 2 Phillim. 122; *In re Francis Lamb*, 4 Notes of Cas. 561; *Nutt v. Nutt*, 1 Freem. Ch. (Miss.) 128; *Ex parte Henry*, 24 Ala. 638; *Brown v. Tilden*, 5 Har. & J. (Md.) 371; *Devecmon v. Devecmon*, 43 Md. 335; *Watts v.*

crastination and sudden death from apoplexy ensued,²¹ or where execution was prevented by bodily weakness,²² or duress,²³ or sudden incapacity,²⁴ or supervening mental inability or insanity,²⁵ and in general, wherever it was rendered impossible by the so-called act of God.²⁶ So also instructions for making a will, reduced to writing by an attorney, or a draft prepared in conformity with the testator's intentions, have been held entitled to probate where the completion of the instruments was prevented by sudden death, incapacity, etc.,²⁷ and the writings were proved to contain the final intentions of the deceased,²⁸ the continuance of such intentions being essen-

Public Admr., 4 Wend. (N. Y.) 168; *Gaskins v. Gaskins*, 3 Ired. (25 N. C.) 158.

21 *Warburton v. Burrows*, 1 Addams Ecc. 383.

22 *Thomas v. Wall*, 3 Phillim. 23.

23 *L'Huille v. Wood*, 2 Lee Ecc. 22.

24 *Lamkin v. Babb*, 1 Lee Ecc. 1.

25 *Hoby v. Hoby*, 1 Hagg. Ecc. 146; *Guthrie v. Owen*, 2 Humph. (Tenn.) 202, 36 Am. Dec. 311.

26 *Scott v. Rhodes*, 1 Phillim. 12; *In re James Taylor*, 1 Hagg. Ecc. 641; *Masterman v. Maberly*, 2 Hagg. Ecc. 235.

27 *Castle v. Torre*, 2 Moore P. C. C. 133; *Goodman v. Goodman*, 2 Lee Ecc. 109; *Robinson v. Chamberlayne*, 2 Lee Ecc. 129; *In re Bathgate*, 1 Hagg. Ecc. 67; *Huntington v. Huntington*, 2 Phillim. 213; *Sikes v. Snaith*, 2 Phillim. 351; *Lewis v. Lewis*, 3 Phillim. 109; *Allen v. Manning*, 2 Addams Ecc. 490; *Boofter v.*

Rogers, 9 Gill (Md.) 44, 52 Am. Dec. 860; *Parkison v. Parkison*, 12 Smedes & M. (Miss.) 672; *Phoebe v. Boggess*, 1 Gratt. (Va.) 129, 42 Am. Dec. 543; *Mason v. Dunman*, 1 Munf. (Va.) 456.

Where the memorandum was in the form of answers to questions, see *Green v. Skipworth*, 1 Phillim. 53.

Where an incomplete memorandum may be admitted to probate, the testator having suddenly died, see *Boone and Newsam v. Spear*, 1 Phillim. 345; *Read v. Phillips*, 2 Phillim. 122; *Musto v. Sutcliffe*, 3 Phillim. 104; *Nathan v. Morse*, 3 Phillim. 530.

28 *In re Herne*, 1 Hagg. Ecc. 222; *In re Robinson*, 1 Hagg. Ecc. 643; *Bragge v. Dyer*, 3 Hagg. Ecc. 207; *Elsden v. Elsden*, 4 Hagg. Ecc. 183; *Gillow v. Bourne*, 4 Hagg. Ecc. 192; *Theakston v. Marson*, 4 Hagg. Ecc. 290; *Abbott v. Peters*, 4 Hagg. Ecc. 380; *Walker v.*

tial to their vitality.²⁹ But the courts always viewed such instruments with suspicion³⁰ and, in proportion to the incompleteness of the document, demanded a higher degree of evidence.³¹ An incomplete paper remaining in the custody of the testator raised a presumption of some further intention in regard to it and, before the court would recognize its testamentary character, this presumption had to be overcome.³² But the more modern doctrine is that a nuncupative will can be made only by spoken words or by signs and that, if the words be reduced to writing by the testator or by some one else at his request, they lose their nuncupative character.³³ And

Walker, 1 Mer. 503; *Roose v. Moulds*, 1 Addams Ecc. 129; *Beaty v. Beaty*, 1 Addams Ecc. 154.

²⁹ *Boofter v. Rogers*, 9 Gill (Md.) 44, 52 Am. Dec. 860; *Brown v. Shand*, 1 McCord (S. C.) 409; *Public Admr. v. Watts*, 1 Paige (N. Y.) 347.

³⁰ *Wood v. Medley*, 1 Hagg. Ecc. 645; *Reay v. Cowcher*, 2 Hagg. Ecc. 249; *Ex parte Henry*, 24 Ala. 638; *Frierson v. Beall*, 7 Ga. 348; *Plater v. Groome*, 3 Md. 96, 134; *Jones v. Key*, 4 Dev. (N. C.) 301; *Beaty v. Beaty*, 1 Addams Ecc. 154; *Montefiore v. Montefiore*, 2 Addams Ecc. 354.

³¹ *Harris v. Bedford*, 2 Phillim. 177; *Stewart v. Stewart*, 2 Moore P. C. C. 193; *Theakston v. Marson*, 4 Hagg. Ecc. 290.

³² *Harris v. Bedford*, 2 Phillim. 177; *Beaty v. Beaty*, 1 Addams Ecc. 154; *Doker v. Goff*, 2 Addams Ecc. 42.

³³ *Stamper v. Hooks*, 22 Ga. 603, 68 Am. Dec. 511; *Ellington v. Dil-*

lard, 42 Ga. 361; *Godfrey v. Smith*, 73 Neb. 756, 10 Ann. Cas. 1128, 103 N. W. 450; *In re Hebden's Will*, 20 N. J. Eq. 473; *Kennedy v. Douglas*, 151 N. C. 336, 66 S. E. 216; *Porter's Appeal*, 10 Pa. St. 254; *Wiley's Estate*, 187 Pa. St. 82, 67 Am. St. Rep. 569, 40 Atl. 980; *Butler's Estate*, 223 Pa. St. 252, 72 Atl. 508; *Mundhall's Estate*, 234 Pa. St. 169, 83 Atl. 66; *Hunt v. White*, 24 Tex. 643; *Reese v. Hawthorn*, 10 Gratt. (Va.) 548; *Brown v. State*, 87 Wash. 44, 151 Pac. 81. See, also, citations note 34, post.

At the present time in the District of Columbia the law will not admit informal instruments to probate. In referring to the rule prior to such time, the court said, in effect, "that an incomplete and unsigned will or memorandum, to be admitted to probate, as a will of personal property, must have been intended to have operated as a will in its then state, or if in-

it seems that under the modern statutes and rulings, even verbal instructions for drawing up a written will, although spoken in the presence of the proper number of witnesses, can not be admitted to probate as a nuncupative will.³⁴

§ 172. The Same Subject: Wills of Soldiers and Sailors, Informally Executed, May Be Admitted to Probate.

The wills of the privileged classes—soldiers in actual military service and mariners and seamen at sea—executed in an informal manner and lacking the formalities

tended as a memorandum for a formal will, the testator must have been prevented from carrying out his intention through sickness, death or some other casualty and there must have been a continuance of such intention down to the time of death.”—*Cruit v. Owen*, 21 App. D. C. 378.

In *Butler's Estate*, 223 Pa. St. 252, 72 Atl. 508, where a draft of the will had been drawn up, but was not signed, it was rejected, the court saying: “The evidence shows that while he was unable to sign personally, he was not in such an extremity as to prevent him from calling on another to sign for him.” See, also, *Mundhall's Estate*, 234 Pa. St. 169, 83 Atl. 66.

Porter's Appeal, 10 Pa. 254, was a case where the decedent declared his intentions to a scrivener who noted them in writing at the time and in the presence of the decedent, who called upon the two persons present to witness that

that was his will, yet it was held not a valid nuncupative will because the testator had in contemplation a will to be put in writing.

³⁴ *Knox v. Richards*, 110 Ga. 5, 35 S. E. 295; *In re Grossman*, 75 Ill. App. 224; *In re Grossman*, 175 Ill. 425, 67 Am. St. Rep. 219, 51 N. E. 750; *Donald v. Unger*, 75 Miss. 294, 22 So. 803; *Dockum v. Robinson*, 26 N. H. 372; *In re Hebden's Will*, 20 N. J. Eq. 473; *In re Male's Will*, 49 N. J. Eq. 266, 24 Atl. 370. See, also, citations note 33.

“It must be proved that the deceased, while uttering the words offered as a will, had not only a present testamentary intention, but also an intention to make an oral will, and that he intended the words he then uttered and no others should constitute his will. If he only gives instructions for a will that he desires to have reduced to writing, but fails to execute, the instructions can not be sustained as a nuncupative will.”

essential to the validity of wills of those in the ordinary pursuits of life, have been looked upon with favor and have been accepted for probate as having expressed the final intent of a privileged testator regarding the disposition of his personal property after his death. Letters and entries in books have been admitted to probate, it being of course necessary in all cases that the instrument be testamentary in character, that is, showing an intention on the part of the maker to dispose of his property after his death. Thus, a letter dated January 28, 1839, less than two years after the passage of the Statute of Wills of 1 Vict., ch. 26, written by a lieutenant in the army who died while stationed abroad with his regiment, addressed to his solicitor, but unattested, was admitted to probate as a military testament.³⁵ The letter of the master of a merchant vessel who died at sea, was admitted as the testament of a mariner under section 11 of the Statute of Wills.³⁶ Likewise, entries made by the master of a vessel, in a book wherein he entered any particular occurrence that took place during his voyages, to the effect that if anything should happen to him his wife should have everything he possessed, he having died at Valparaiso, during a voyage, were admitted to probate.³⁷ A testamentary instrument, executed by an

—*Godfrey v. Smith*, 73 Neb. 756, 10 Ann. Cas. 1128, 103 N. W. 450.

³⁵ *Goods of Phipps*, 2 Curt. 368. In *Goods of Prendergast*, 5 Notes of Cas. 92, the letter of a gunner in the service of the East India Company which was officially returned to England after his death, was admitted to probate, although it was signed only by the mark of the testator and there was no

proof of the identity of the paper, the witnesses being dead. In *Goods of Spratt*, (1897) P. 28, a letter by a military officer in actual military service was held good as a military will.

³⁶ *Goods of Milligan*, 2 Rob. Ecc. 108; *Goods of Parker*, 2 Sw. & Tr. 375. See, also, *Goods of Lay*, 2 Curt. 375.

³⁷ *Goods of Thompson*, 5 Notes of Cas. 596.

army officer before embarking for India, without attestation clause or proof that the witnesses were present at the time of execution, but referred to in a codicil duly made and attested on the voyage, was held to be incorporated as a part of his will, especially for the reason that he was a soldier in actual military service.³⁸ The unattested codicil of the purser of a vessel was admitted.³⁹ The letter of a soldier en route to South Africa, reading as follows: "In case anything happens to me I wish the whole of any property I may leave or become entitled to to be left to Doris," was held a valid military testament;⁴⁰ likewise the letter of a sergeant in the army to his fiancée, in which he stated that if anything should happen to him, she was to have everything, was allowed for probate.⁴¹

§ 173. The Terms "Soldiers" and "Seamen" Include Officers and All Degrees.

Although the excepted or privileged classes are designated as "soldiers," "mariners," and "seamen," yet the exception applies to the officers as well as to the men and includes those in all degrees of the ser-

³⁸ Goods of Johnson, 2 Curt. 341.

³⁹ Goods of Hayes, 2 Curt. 338.

See, also, Goods of Thorne, 29 Jur. 569; Goods of Donaldson, 2 Curt. 386; Gould v. Safford, 39 Vt. 498; Van Deuzer v. Gordon, 39 Vt. 111; Leathers v. Greenacre, 53 Me. 561; Botsford v. Krake, 1 Abb. Pr. N. S. 112.

In Goods of Scott, (1903) P. 243, the declaration of a soldier that all his effects should be credited to his sister was held a good military will.

⁴⁰ Goods of Cory, (1901) 84 L. T. Rep. 270.

⁴¹ Goods of Gordon, (1905) 21 Times L. R. 653.

In the Matter of Anderson's Estate, (1916) P. 49, an informal document of a member of an ambulance corps was rejected solely on the ground that at the time it was written he was not in actual military service; no objection, however, was raised as to the form of the instrument as a military testament.

vice. In an early case,⁴² Sir Herbert Jenner referred to the case of *Earl of Euston v. Lord Henry Seymour*, under the twenty-third section of the Statute of Frauds, and, quoting from the notes of Sir William Wynn, said: "It was 'the inclination of the mind' to hold that the term 'mariner' or 'seamen' included the whole profession, 'because he did not know where to stop.' Some reasons assigned for the exception (which was not merely to protect illiterate persons), it is said, applied just as well to the commander in chief, as to the common seamen; the same sudden emergency might arise to render it necessary for the individual to dispose of his property by word of mouth, in the one case as in the other; and whilst at sea, one might be *inops consilii* as well as the other." The exception was early applied to a lieutenant in the army,⁴³ and to a surgeon in the employ of The East India Company.⁴⁴ The master of a vessel is included in the term "seamen,"⁴⁵ likewise the purser of a boat,⁴⁶ the mate,⁴⁷ or the cook.⁴⁸

§ 174. Question as to Whether Soldiers and Seamen Have an Unqualified Right to Make Nuncupative Wills.

It has been questioned both in regard to soldiers in service and mariners and seamen at sea, whether their

⁴² *Goods of Hayes*, 2 Curt. 338.

⁴³ *Goods of Phipps*, 2 Curt. 368. See, also, *Goods of Johnson*, 2 Curt. 341; *Goods of Gordon*, (1905) 21 Times L. R. 653; *Stopford v. Stopford*, 19 Times L. R. 185.

⁴⁴ *Goods of Donaldson*, 2 Curt. 386. See, also, *Shearman v. Pyke*, cited in *Drummond v. Parish*, 3 Curt. 522, at p. 539; *Goods of Spratt*, (1897) P. 28.

⁴⁵ *Goods of Milligan*, 2 Rob. Ecc. 108; *Goods of Thompson*, 5 Notes of Cas. 596; *Goods of Parker*, 2 Sw. & Tr. 375.

⁴⁶ *Goods of Hayes*, 2 Curt. 338. See, also, *Morrell v. Morrell*, 1 Hagg. Ecc. 51.

⁴⁷ *Goods of Lay*, 2 Curt. 375.

⁴⁸ *Ex parte Thompson*, 4 Bradf. (N. Y.) 154.

right to make oral testaments is unqualified, or whether it is to be exercised only in cases of imminent peril. The wills of these privileged classes must be distinguished from oral testaments which may be made by those in civil life, for the latter testaments are never allowed except the testator be in his last sickness. As to soldiers and sailors, there are times when they are surrounded by imminent dangers; often they have neither the time nor the opportunity to execute a formal written will; again, they may be without legal counsel and therefore unable to prepare a testamentary document according to the usual formalities. An individual in the ordinary walks of life can make a nuncupative will, if at all, only in his last sickness. A soldier or a sailor can make an oral testament while in the best of health, therefore sickness is not the criterion; even in the field he may have some friend at hand who could give him the necessary legal advice for preparing a written will, so lack of legal counsel can not be controlling. He may be at home on a furlough, exposed to no dangers that are not common to all others, and with the time and opportunity to execute a formal testamentary document. Therefore, oral testaments of soldiers are allowed only when in actual military service, and of mariners and seamen only when at sea. The rule is that if a soldier or seaman comes within the exceptions mentioned, his oral testament of personal property is valid, but the authorities which have interpreted the meaning of the excepted conditions show that such wills are allowed only when the soldier or the sailor is confronted with the perils of war or of the elements, with the consequent apprehension of death. Their calling, however, gives them additional testamentary powers as, for instance, a passenger on a vessel at sea can not make a

nuncupative will. Soldiers and seamen are under orders, their time is commanded by others; in the event of dangers they protect life and property at their own peril. Therefore, it may be said that oral testaments of soldiers and sailors are allowed because of the nature of their undertakings, but only at such times when the circumstances may be said to produce an extreme case.⁴⁹

§ 175. Soldiers in Actual Military Service Are Those on an Expedition.

Section 11 of the Statute of Wills, 1 Vict., ch. 26, is as follows: "Provided always, that any *soldier being in actual military service, or any mariner, or seaman being at sea*, may dispose of his personal estate as he might have done before the making of this act." This was a clear recognition of the right of the classes mentioned to dispose of personalty by oral testaments in the same manner as theretofore. Since such right was founded upon the civil law, the words "in actual military service," should be construed according to the meaning given them

⁴⁹ Drummond v. Parish, 3 Curt. 522; White v. Repton, 3 Curt. 818; Goods of Hill, 1 Rob. Ecc. 276; Leathers v. Greenacre, 53 Me. 573; Prince v. Hazleton, 20 Johns. (N. Y.) 502, 11 Am. Dec. 307; Hubbard v. Hubbard, 12 Barb. (N. Y.) 148.

Compare: Taylor v. D'Egville, 3 Hagg. Ecc. 202; Bragge v. Dyer, 3 Hagg. Ecc. 207; King's Proctor v. Daines, 3 Hagg. Ecc. 218; Goods of Hiscock, (1901) P. 78; Gattward v. Knee, (1902) P. 99; Weir v. Chidester, 63 Ill. 453.

In re O'Connor's Will, 65 Misc. Rep. 403, 121 N. Y. Supp. 903, in

determining the effect of certain utterances made by a mariner at sea and while ill, the court says: "The finding must, therefore, be either that he thought he was making a vain and useless utterance or that he invested his act with all the solemnity and purpose of a will. Sickness may not be necessary to the validity of the transaction, but it affords ground for believing that the act, which might not have had a testamentary meaning if done in health, assumed the gravity and significance of a will when done by one who confronted death."

under the Roman law, and there they have been held to apply only to soldiers who were *on an expedition*.⁵⁰

§ 176. When Is a Soldier on an Expedition? Illustrations.

Under the Roman law a soldier who was engaged in doing something toward fighting an enemy was considered as being *in expeditione*. If a state of war does not exist, however, can it be said that there is an enemy? A soldier in the time of peace has practically the same opportunity of making his will as has a civilian. But should a state of war exist, the question then is, Has the soldier taken any steps toward joining the forces in the field? In the case of an invasion or civil war, leaving his home to guard defenses has been said to constitute being in actual mili-

⁵⁰ Drummond v. Parish, (1843) 3 Curt. 522; White v. Repton, 3 Curt. 818; Goods of Hiscock, (1901) P. 78; Gattward v. Knee, (1902) P. 99.

"There be three sorts of men which be termed in law by the name of soldiers. The first be milites armati, armed soldiers. The second be milites literarii, lettered soldiers, as Doctors of the Law. The third sort are milites cœlestes, celestial or heavenly soldiers, as clergymen and divines: For so the law doth term them. Concerning the first sort, either they be such as lie safely in some castle or place of defence, or besieged by the enemy, only in readiness to be employed in case of invasion or rebellion; and then they do not enjoy these military privileges: or else they be such as are in expedition or actual service

of wars; and such are privileged, at least during the time of their expedition, whether they be employed by land or by sea, and whether they be horsemen or footmen. Concerning the other two sorts of soldiers, many are of this opinion, that they do not enjoy the aforesaid privileges, because they are not soldiers properly so called, but metaphorically. Others are of a contrary opinion, affirming that the great pains and studious travel of learned lawyers (especially Doctors of Law and such like) are no less beneficial to their country, than the hardy adventures of those armed soldiers."—Swinburne, Wills, pt. 1, § 14, p. 63.

"Let it not here escape our observation, that these privileges belong only to such soldiers as are in expedition, or actual service of

tary service.⁵¹ Likewise, where a minor had volunteered for active service in South Africa and had received his orders to embark and, having gone into barracks for the purpose of being drafted, but before sailing, he made an oral will, it was said he was within the exception mentioned in section 11 of the Statute of Wills.⁵² And where an order has been issued for the mobilization of troops,

war, and not to such as lie safely and securely in some castle, garrison or other like place of defense."—Godolphin, in the Orphan's Legacy, ch. 5, p. 16.

In Louisiana the term "nuncupative testament" is given to a written testamentary instrument executed according to certain prescribed formalities, the law relative to wills of soldiers being taken almost literally from the Code Napoleon, and is found in the Louisiana Civil Code, arts. 1597-1600. The will of a soldier in the field or on a military expedition may be received by a commissioned officer in the presence of two witnesses; or if he be sick or wounded, it may be received by the physician or surgeon attending him, assisted by two witnesses. Such a testament is subject to no other formalities, but it must be reduced to writing and signed by the testator, if he can write, and by the person receiving it, and by the witnesses. It becomes void six months after the testator has returned to a place where he has an opportunity to make a will in the ordinary manner. See, also, Code Napoleon, 981, 982.

51 Goods of Hiscock, (1901) P. 78; Van Deuzer v. Gordon, 39 Vt. 111.

52 Goods of Hiscock, (1901) P. 78.

In Goods of Phipps, 2 Curt. 368, a letter dated Jan. 28, 1839, written by a lieutenant while stationed abroad with his company, although unattested, was admitted to probate. It was proposed by the father of the deceased, who, had there been no will, would anyway have been entitled to the estate, this fact being mentioned as a reason for accepting the informal document as a soldier's will. In deciding the case, Sir Herbert Jenner said: "I am not prepared to say that our regiments in the colonies, or in garrison at home, are in actual military service. I can't think that it was the intention of the legislature to except every officer, under the circumstances, from the operation of the act. Under the peculiar circumstances of this case, considering that the party deceased was with his regiment, and in the opinion of the War Office, in actual military service at the time, I shall allow this letter to pass."

although an enlisted soldier may have done nothing under it, yet, according to an English authority, the order may be said to have so altered his position as to practically place him *in expeditione*.⁵³ In a leading American case, however, the court uses language to the effect that the oral testament of a soldier mustered into service, but made while he remained in barracks or while quartered at some permanent military station and where he was not exposed to attacks by the opposing foe and also before he had, under orders, started to move against the enemy, would not be entitled to probate.⁵⁴

§ 177. The Same Subject.

The term "expedition" is not confined to that movement of troops which immediately precedes the shock of battle.⁵⁵ If the testator, being a soldier, be in that part of the country where active operations are con-

⁵³ Gattward v. Knee, (1902) P. 99. See, also, Goods of Thorne, 29 Jur. 569; Stopford v. Stopford, 19 Times L. R. 185; Goods of Gordon, 21 Times L. R. 653.

In the matter of the Estate of Anderson, (1916) P. 49, a member of the ambulance corps was about to leave his home under orders to join H. M. S. Pembroke, permanently stationed at Chatham. At his home, on the morning of his departure, he wrote an informal document disposing of his property. It was held he was not within the exception of the statute.

In Stopford v. Stopford, 19 Times L. R. 185, a letter written by an officer in barracks, on the day he was departing for service

in South Africa, was held good as a military testament.

In Goods of Gordon, (1905) 21 Times L. R. 653, a sergeant in the army, stationed at Woolwich, received orders to report and proceed to South Africa. While still in quarters he made a nuncupative will, in the form of a letter. It was held valid as a military testament.

Compare: Leathers v. Greenacre, 53 Me. 561; Van Deuzer v. Gordon, 39 Vt. 111.

⁵⁴ Leathers v. Greenacre, 53 Me. 573. See, also, Estate of Anderson, (1916) P. 49; Van Deuzer v. Gordon, 39 Vt. 111.

⁵⁵ Leathers v. Greenacre, 53 Me. 573.

stantly going on, unquestionably he can make his oral testament while in camp; and if soon after he goes on a raid, is captured and dies in prison, probate will be allowed.⁵⁶ One who is taken sick while on the march and is ordered for treatment to a field hospital near the scene of operations, is in actual military service.⁵⁷ It is immaterial whether the expedition be invading the country of the enemy, or whether it be quelling an insurrection in the home state of the testator.⁵⁸

§ 178. When Does a Military Expedition Begin or End?

All soldiers are not considered as being in actual military service. Since a soldier may make an oral testament only while on a military expedition, the question is, When does such expedition begin and when does it end? A soldier at home on a furlough can not make a nuncupative will.⁵⁹ It is generally conceded that a soldier at home, although under orders to join his company and proceed against the enemy, is not in actual military service.⁶⁰ In England, if he has gone into barracks preparatory to

⁵⁶ *Goods of Hiscock*, (1901) P. 78; *Van Deuzer v. Gordon*, 39 Vt. 111.

⁵⁷ *Leathers v. Greenacre*, 53 Me. 573. See, also, *Botsford v. Krake*, 1 Abb. Pr. N. S. 112.

⁵⁸ *Gould v. Safford*, 39 Vt. 498.

In the foregoing case the court said: "He could not be considered as absent on a furlough, for he had no leave of absence from military service, and he remained behind in obedience to an order. The entire army to which he belonged was at that time on an 'expedi-

tion,' and, in our judgment, he was as much on that expedition while in the hospital tent as when he was in his own tent with his company." In this case the testator was in a field hospital close to the scene of operations, which caused the court to remark: "He was in the presence of actual war, and was surrounded by perils."

⁵⁹ *Will of Smith*, 6 Phila. (Pa.) 104.

⁶⁰ *Estate of Anderson*, (1916) P. 49; *Van Deuzer v. Gordon*, 39 Vt. 111.

leaving for the field of war, he is within the exception,⁶¹ but the American rule is not so broad, some movement toward taking part in the hostilities being necessary, although the extent of such movement has never been clearly defined.⁶² In an early English case it was held that an officer in the army stationed at home and dying there in 1843, was not in actual military service.⁶³ This rule was affirmed very shortly afterwards in a case wherein the will of a captain in the army quartered in barracks at St. Johns, New Brunswick, was rejected on the ground that the deceased was not within the exception of the eleventh section of the Statute of Wills; it being there held that there was no distinction between death in a colony and at home.⁶⁴ The same rule was again followed in a subsequent case wherein it was ruled that an officer with his headquarters and residence in India, who died on a tour of inspection of his command, was not privileged to make an excepted military testament.⁶⁵ In an early American case it was held that the nuncupative will of a soldier who, having enlisted, still remained in the camp with his regiment in the state where it was raised, was invalid; but if, afterwards, in the enemy's country and actually exposed to the dangers of warfare, he should adopt the will previously made, it could be admitted to probate.⁶⁶

⁶¹ *Goods of Hiscock*, (1901) P. 78; *Gattward v. Knee*, (1902) P. 99; *Stopford v. Stopford*, 19 Times L. R. 185; *Goods of Gordon*, (1905) 21 Times L. R. 653.

⁶² *Van Deuzer v. Gordon*, 39 Vt. 111. See language of court in *Leathers v. Greenacre*, 53 Me. 561.

⁶³ *Drummond v. Paris*, 3 Curt. 522.

⁶⁴ *White v. Repton*, 3 Curt. 818.

⁶⁵ *Goods of Hill*, 1 Rob. Ecc. 276 (1845). See, post, § 179 and note 65 as to the will of a naval officer being denied probate under like circumstances.

⁶⁶ *Van Deuzer v. Gordon*, 39 Vt. 111.

In *Leathers v. Greenacre*, 53 Me. 561, the court uses this language:

§ 179. **Mariners and Seamen at Sea.**

As before stated, the terms "mariner" and "seamen" include all persons in naval or mercantile service.⁶⁷ A passenger, however, can not make a nuncupative will as a mariner at sea, even though he be a mariner by vocation en route to his own ship.⁶⁸ But in opposition to this, it has been held that a letter written by an invalid surgeon returning home on board the regular line of steamers, might be admitted to probate as the will of a seaman made at sea.⁶⁹ In legal parlance, waters within the ebb and flow of the tide are considered the sea; so the captain of a vessel during a voyage, while lying at anchor in an arm of the sea, may make a nuncupative will.⁷⁰ In England, a mariner serving on board a public ship permanently stationed in harbor, was held to be "at sea" within the meaning of the statute.⁷¹ And the mate of a ship, ashore on leave in a foreign port, who received a severe fall and died of his injuries without having been taken back to his ship, was held to be within the exception.⁷² But the commander of a naval force at Jamaica,

"Doubtless if Leathers had written this letter after he had been mustered into the service of the United States, but while he remained in barracks at Augusta, or while thus quartered at any permanent military depot or station in one of the loyal states not exposed to the incursions of the enemy, before he had crossed over into Virginia with his regiment to take part in the hostilities existing there, and before he had begun to move under military orders against the foe, we should feel bound to say that this was no valid will and

that it is not entitled to probate as such."

⁶⁷ See, ante, § 173 and notes.

⁶⁸ Warren v. Harding, 2 R. I. 133.

⁶⁹ In re Saunders, 11 Jur. N. S. 1027; s. c., L. R. 1 P. & D. 16.

⁷⁰ Hubbard v. Hubbard, 8 N. Y. 199.

⁷¹ In re McMurdo, L. R. 1 P. & D. 540.

⁷² Goods of Lay, 2 Curt. 375.

In Goods of Austen, 2 Rob. Ecc. 611, it was held that an admiral of the navy engaged in an expedition up a river and entirely inland, was

who lived at his official residence on the island, could not be construed to be "at sea."⁷³

§ 180. In Some Jurisdictions, Any Qualified Person May, Under Certain Restrictions, Make a Nuncupative Will.

In some jurisdictions, in addition to soldiers and sailors, any one qualified to make a written will may, under certain restrictions, make a nuncupative testament.⁷⁴ These restrictions were originally imposed by the Statute of Frauds,⁷⁵ but oral wills, except of soldiers and seamen, as before noted, were abolished by the Statute of Wills in England.⁷⁶ In some of the United States, nuncupative testaments are allowed under conditions practically the

nevertheless practically engaged in maritime service.

⁷³ Earl of Euston v. Lord Henry Seymour, cited in 2 Curt. 338.

See, ante, § 178 and notes, as to the will of officers in the army being denied probate under similar circumstances.

In Louisiana the term "nuncupative testaments" is applied to written testamentary instruments executed according to prescribed formalities. Wills of mariners and seamen at sea are separately provided for (Louisiana Civil Code, arts. 1601-1604), the rules being taken almost literally from the Code Napoleon. Testaments made during a voyage at sea are received by the master of the vessel in the presence of three witnesses taken by preference from among the passengers; if no passengers, then from among the crew. Such a testament made at sea can make

no disposition in favor of any person employed on board the vessel unless he be a relative of the testator. It is subject to no other formality, but must be reduced to writing and be signed by the testator, if he can write, by the party receiving it, and by the witnesses. Such a testament shall not be valid unless the testator dies at sea or within three months after he has landed in a place where he can make his will in the ordinary manner. See, also, Code Napoleon, §§ 985, 987, 988, 995, 996.

⁷⁴ See, ante, § 163, as to the definition given by early writers of nuncupative wills.

⁷⁵ 29 Charles II (A. D. 1677). See, ante, §§ 165, 166, as to the provisions of the Statute of Frauds affecting oral testaments.

⁷⁶ 1 Vict., ch. 26. See, ante, § 168, as to the effect of the Statute of Wills on oral testaments.

same as those set forth in the Statute of Frauds.⁷⁷ Where the law sanctions oral wills of persons not included in the excepted classes—soldiers and seamen—it almost universally provides that they shall not be valid unless made in the last sickness of the deceased, in the house of his habitation or dwelling, or where he has been a resident for ten days or more next preceding the making of his will, except where such person, being absent from home, was surprised by sickness and died before returning to his place of dwelling.⁷⁸

§ 181. Meaning of the Term “Last Sickness”—In Extremis.

The meaning of the term “last sickness,” as applied to the maker of a nuncupative testament, is not well settled. The majority of the cases construe it as equivalent of being *in extremis*, and to denote the sudden and severe illness immediately preceding physical dissolution, when there is neither time nor opportunity to make a written will,⁷⁹ or when supervening physical or mental incapacity

⁷⁷ See, ante, § 169, as to the law of wills of some states being based on the Statute of Frauds, of others on the Statute of Wills.

⁷⁸ 29 Charles II, ch. 3, § 19 (Statute of Frauds).

⁷⁹ *Scaife v. Emmans*, 84 Ga. 619, 20 Am. St. Rep. 383, 10 S. E. 1097; *Bellamy v. Peeler*, 96 Ga. 467, 23 S. E. 387; *Harp v. Adams*, 142 Ga. 5, 82 S. E. 246; *Mulligan v. Leonard*, 46 Iowa 692; *Baird v. Baird*, 70 Kan. 564; *O'Neill v. Smith*, 33 Md. 569; *Sadler v. Sadler*, 60 Miss. 251; *Godfrey v. Smith*, 73 Neb. 756, 10 Ann. Cas. 1128, 103 N. W. 450; *Carroll v. Bonham*, 42 N. J. Eq. 625, 9 Atl. 371; *Prince v. Hazle-*

ton, 20 Johns. (N. Y.) 502, 11 Am. Dec. 307; *Hubbard v. Hubbard*, 12 Barb. (N. Y.) 148; *Kennedy v. Douglas*, 151 N. C. 336, 66 S. E. 216; *Yarnall's Will*, 4 Rawle (Pa.) 46, 26 Am. Dec. 115; *Boyer v. Frick*, 4 Watts & S. (Pa.) 357; *Werkheiser v. Werkheiser*, 6 Watts & S. (Pa.) 184; *Haus v. Palmer*, 21 Pa. St. 296; *Rutt's Estate*, 200 Pa. St. 549, 50 Atl. 171; *Butler's Estate*, 223 Pa. St. 252, 72 Atl. 508; *Mundhall's Estate*, 234 Pa. St. 169, 83 Atl. 66; *In re Connaughton's Will*, 11 Pa. Co. Ct. Rep. 460; *Jones v. Norton*, 10 Tex. 120; *Moffett v. Moffett*, 67 Tex. 642, 4 S. W. 70; *Martinez v. Martinez*, 19 Tex.

renders it afterwards impossible.⁸⁰ Probate of nuncupative wills has been refused where the testator did not die until two months later;⁸¹ and in other cases where he

Civ. App. 661, 48 S. W. 532; *Reese v. Hawthorn*, 10 Gratt. (Va.) 548; *Brunson v. Burnet*, 2 Pinney (Wis. 185) 136.

In the recent case of *Harp v. Adams*, 142 Ga. 5, 82 S. E. 246, the following instruction was held good, although the case was reversed on other grounds. The instruction reads: "In testing the validity of an alleged nuncupative will, it is impossible to lay down a fixed and unvarying rule as to what length of time may elapse between the dictation of said will and the death of the testatrix. The test to be applied is not one of time alone. The length of time must be considered in connection with and in the light of all the circumstances surrounding the occasion. After all, it is a question of fact to be determined by the jury whether or not, under the circumstances, there was a reasonable opportunity to make a written will. A nuncupative will must be made in the last sickness, and it is allowed under the law from necessity, and must be in extremis, and if you believe that Mrs. H., after making the alleged nuncupative will, had the time and opportunity, and means at hand, to have reduced it to

writing, but failed to do so, then said alleged will is invalid."

⁸⁰ *In re Corby*, 29 Eng. L. & Eq. 604; *Sampson v. Browning*, 22 Ga. 293; *Huse v. Brown*, 8 Me. 167; *Sadler v. Sadler*, 60 Miss. 251; *Rouse v. Morris*, 17 Serg. & R. (Pa.) 331; *Gwin v. Wright*, 8 Humph. (Tenn.) 639.

In the leading case of *Prince v. Hazleton*, 20 Johns. (N. Y.) 502, 11 Am. Dec. 307, the court said: "The statute was never meant to uphold oral wills made when there was no immediate apprehension of death and no inability to reduce the will to writing. A case of necessity is the only case in which any favor ought to be shown them. If they have been made in a case unaccompanied with necessity, the presumption of fraud attaches. Some diseases continue for months, sometimes for years. If nuncupative wills can be permitted at all, in the case of chronic disorders, which make silent and slow, but sure and fatal approaches, it is only in the very last stage or extremity of them. In no other period can such a disorder be deemed, within any reasonable construction of the Statute of Frauds, a man's last sickness."

⁸¹ *Jones v. Norton*, 10 Tex. 120.

survived thirty,⁸² nine,⁸³ six,⁸⁴ five⁸⁵ and four days.⁸⁶ Some decisions go so far as to deny probate to a nuncupative will made only one day,⁸⁷ or even one hour before death.⁸⁸ Oral testaments should be allowed only in the last stage or extremity of sickness, where death is approaching, coupled with the physical inability to make a written will. Any other rule would allow the play of, and perhaps excite "the selfish and dark passions of the human mind," for it would be to the interest of a legatee that the sickness of the testator should prove his last, since recovery would revoke the oral testament, whereas a written will could be revoked only by a duly executed writing.⁸⁹

There are, however, good authorities which hold that a nuncupative testament made during the last illness of the deceased is not invalid because he may have had the time, opportunity and capacity to reduce it to writing,⁹⁰ but the better rule and the weight of authority is otherwise.

§ 182. Necessity of Calling Others to Witness the Testament.

In order to constitute a valid nuncupative testament, the testator must have had, when he declared the same, a present intent to make a will. This intent should be

⁸² *Ellington v. Dillard*, 42 Ga. 361.

⁸³ *Carroll v. Bonham*, 42 N. J. Eq. 625, 9 Atl. 371; *Yarnall's Will*, 4 Rawle (Pa.) 46, 26 Am. Dec. 115.

⁸⁴ *Morgan v. Stevens*, 78 Ill. 287; *Prince v. Hazleton*, 20 Johns. (N. Y.) 502, 11 Am. Dec. 307.

⁸⁵ *Reese v. Hawthorn*, 10 Gratt. (Va.) 548.

⁸⁶ *Haus v. Palmer*, 21 Pa. St. 296.

⁸⁷ *O'Neill v. Smith*, 33 Md. 569; *Werkheiser v. Werkheiser*, 6 Watts & S. (Pa.) 184.

⁸⁸ *Porter's Appeal*, 10 Pa. St. 254.

⁸⁹ *Prince v. Hazleton*, 20 Johns. (N. Y.) 502, 11 Am. Dec. 307.

⁹⁰ *Johnston v. Glasscock*, 2 Ala. 218, 242; *Harrington v. Stees*, 82 Ill. 50, 25 Am. Rep. 290; *Page v. Page*, 2 Rob. (Va.) 424; *Nolan v. Gardner*, 7 Heisk. (Tenn.) 215; in

distinctly indicated by the testator, either by calling upon some of the persons present to take notice that he is about to make his will, or by some act clearly showing that his words are intended to be testamentary.⁹¹ This

re *Miller's Estate*, 47 Wash. 253, 125 Am. St. Rep. 904, 14 Ann. Cas. 1163, 13 L. R. A. (N. S.) 1092, 91 Pac. 967.

⁹¹ *Bennett v. Jackson*, 2 Phillim. 190; *Parsons v. Miller*, 2 Phillim. 194; *Sykes v. Sykes*, 2 Stewt. (Ala.) 364, 20 Am. Dec. 40; *Sampson v. Browning*, 22 Ga. 293; *Knox v. Richards*, 110 Ga. 5, 35 S. E. 295; *Smith v. Salter*, 115 Ga. 286, 41 S. E. 621; *Scales v. Thornton*, 118 Ga. 93, 44 S. E. 857; *Arnett v. Arnett*, 27 Ill. 247, 81 Am. Dec. 227; *Weir v. Chidester*, 63 Ill. 453; *Grossman's Estate*, 175 Ill. 425, 67 Am. St. Rep. 219, 51 N. E. 750; *Isham v. Bingham*, 126 Ill. App. 513, affirmed 227 Ill. 634, 81 N. E. 690; *Baird v. Baird*, 70 Kan. 564, 3 Ann. Cas. 312, 68 L. R. A. 627, 79 Pac. 163; *Kelly v. Kelly*, 9 B. Mon. (Ky.) 553; *Babineau v. Le Blanc*, 14 La. Ann. 729; *Biddle v. Biddle*, 36 Md. 630; *Garner v. Lansford*, 12 Smedes & M. (Miss.) 558; *Lucas v. Goff*, 33 Miss. 629; *Broach v. Sing*, 57 Miss. 115; In re *Male's Case*, 49 N. J. Eq. 266, 24 Atl. 370; *Brown v. Brown*, 2 Murph. (N. C.) 350; In re *Garland's Will*, 160 N. C. 555, 76 S. E. 486; *Dockum v. Robinson*, 26 N. H. 372; *Bundrick v. Haygood*, 106 N. C. 468, 11 S. E. 423; *Godfrey v. Smith*, 73 Neb. 756, 10 Ann. Cas. 1128, 103 N. W. 450; *Meisenhelter's Will*, 15

Phila. (Pa.) 651; In re *Wiley's Estate*, 187 Pa. St. 82, 67 Am. St. Rep. 569, 40 Atl. 980; *Ridley v. Coleman*, 1 Sneed (Tenn.) 616; *Winn v. Bob*, 3 Leigh (Va.) 140, 23 Am. Dec. 258; *Owen's Appeal*, 37 Wis. 68.

Compare: *Woods v. Ridley*, 27 Miss. 119.

In *Succession of Dauterive*, 39 La. Ann. 1092, 3 So. 341, it was said that a witness who is deaf, or who can not understand the language of the will, is intellectually deaf, and not a valid witness; that under the Roman, French and Spanish law, knowledge of the language in which the will is dictated and taken down is indispensable to the validity of a will which, to be valid, must be executed in the presence of witnesses.

In *Bundrick v. Haygood*, 106 N. C. 468, 11 S. E. 423, where a nuncupative will was rejected because of failure to call witnesses, the court said: "She did not say, in terms or in effect to these witnesses, 'I want you—or I charge you—or I require you to bear witness that I give my property to my sister,' naming her. She should have made the witnesses clearly sensible of the fact that she specially required them to so bear witness, so that they might

is the *rogatio testium*, adapted from the civil law. The testator must, of course, understand the nature of his act.⁹² No set form of words is necessary. Any words, however imperfectly uttered, that convey to the minds of those addressed the idea that the testator desires them to bear witness to the disposition he is making of his property, will be sufficient.⁹³ And, though a form be prescribed by statute, any words such as, "I wish to make a disposition of my effects," will be deemed a compliance with the law.⁹⁴ Merely looking at the persons present while declaring one's will has been held not sufficient in itself, unaccompanied by some word requesting them to bear witness;⁹⁵ but indirect remarks, coupled with looks or actions, may satisfy the requirement.⁹⁶ The words must be spoken when all the witnesses are present;

be charged to do so, and to the further end they might be able to so state when called upon to testify as such witnesses."

Section 19 of the Statute of Frauds (29 Charles II) reads in part as follows: "No nuncupative will shall be good . . . that is not proved by the oath of three witnesses, at the least, that were present at the making thereof, and bid by the testator to bear witness that such was his will, or to that effect."

⁹² Gibson v. Gibson, Walk. (Miss.) 364.

⁹³ Swinburne says: "As for any precise form of words, none is required, neither is it material whether the testator speak properly or improperly, so that his meaning appears."—Swinburne, Wills, pt. 4, § 26.

Harrington v. Stees, 82 Ill. 50, 25 Am. Rep. 290; Parsons v. Parsons, 2 Greenl. (Me.) 298; Parkison v. Parkison, 12 Smedes & M. (Miss.) 678; Yarnall's Will, 4 Rawle (Pa.) 46, 26 Am. Dec. 115; Baker v. Dodson, 4 Humph. (Tenn.) 342, 40 Am. Dec. 650.

⁹⁴ Baker v. Dodson, 4 Humph. (Tenn.) 342, 40 Am. Dec. 650.

⁹⁵ Meisenhalter's Will, 15 Phila. (Pa.) 651.

⁹⁶ Parsons v. Parsons, 2 Greenl. (Me.) 298; Baker v. Dodson, 4 Humph. (Tenn.) 342, 40 Am. Dec. 650.

It is not necessary that the bidding of the witnesses should be by word of mouth; it may be by acts or by signs and gestures. See Arnett v. Arnett, 27 Ill. 247, 81 Am. Dec. 227; Hatcher v. Millard, 2 Coldw. (Tenn.) 30; Winn v. Bob, 3 Leigh (Va.) 140, 23 Am. Dec. 258.

the declaration to one witness on one day and to another on the next day, is not a sufficient bidding of the persons present to witness the will.⁹⁷

§ 183. Intention to Make a Will Must Be Clearly Established by Disinterested Witnesses.

It is necessary that the testamentary capacity of the deceased and the *animus testandi* appear by the most indisputable testimony.⁹⁸ When the testament was made in answer to interrogatories, stricter proof of spontaneity and volition is required than in ordinary cases.⁹⁹ And where the words were drawn from the testator by one whose interest it was to establish them as a will, they did not constitute a valid testament.¹ If any doubt re-

⁹⁷ *Godfrey v. Smith*, 73 Neb. 756, 10 Ann. Cas. 1128, 103 N. W. 450; *Will of Hebden*, 20 N. J. Eq. 473; *Wester v. Wester*, 5 Jones (N. C.) 95; *Estate of Wiley*, 187 Pa. St. 82, 67 Am. St. Rep. 569, 40 Atl. 980; *Weeden v. Bartlett*, 6 Munf. (Va.) 123; *Brown v. State*, 87 Wash. 44, 151 Pac. 81.

⁹⁸ *Morgan v. Stevens*, 78 Ill. 287; *Dorsey v. Sheppard*, 12 Gill & J. (Md.) 192, 37 Am. Dec. 77; *Gibson v. Gibson*, Walk. (Miss.) 364; *Yarnall's Will*, 4 Rawle (Pa.) 46, 26 Am. Dec. 115.

In *Bundrick v. Haygood*, 106 N. C. 468, 11 S. E. 423, where a nuncupative will was denied probate, the court said: "She should have expressed her purpose to make a will. Perhaps it was not necessary that she should do so in terms, but she should have done so in some certain way. She did

not do so, unless by mere implication. She said she wanted to see her sister—naming her—wanted to give her sister all her things—wanted her to have them, but she did not say 'I give her all my things—all my property,' or 'I will make a will and by it give my things to her,' nor any like expression."

⁹⁹ *Isham v. Bingham*, 126 Ill. App. 513, affirmed in 227 Ill. 634, 81 N. E. 690; *Dorsey v. Sheppard*, 12 Gill & J. (Md.) 192, 37 Am. Dec. 77; *Andrews v. Andrews*, 48 Miss. 220.

¹ *Brown v. Brown*, 2 Murph. (N. C.) 350; *Rutt's Estate*, 200 Pa. St. 549, 50 Atl. 171.

In *Isham v. Bingham*, 126 Ill. App. 513, affirmed in 227 Ill. 634, 81 N. E. 690, the court said: "The only part of this conversation relating to the will in which (the

mains as to the spontaneity of the act, the testamentary intention or the capacity, probate will be refused.² A nuncupative will can not be proved by a witness interested in its being established, although he did not acquire his interest until after the will was published,³ for the evidence produced to establish a nuncupative will is more strictly examined by the court than in the case of a will in writing.⁴

§ 184. There Must Be Strict Compliance With the Statutory Requirements.

Where nuncupative wills are allowed, other than those of the privileged classes—soldiers and seamen—the statute invariably prescribes restrictions in order to prevent the perpetration of fraud on the part of designing parties who might seek to obtain some undue advantage of a person in his last sickness and secure his property in fraud of his rightful heirs. They are likewise imposed to avoid the mischief which might arise through ignorance or misunderstanding and to prevent false testi-

deceased) appears . . . to have taken the initiative, is when she is said to have made the statement, 'I have never made a will. I want to give you everything I own to do with as you please.' This declaration is not alone sufficient to constitute a valid nuncupative will under the statute, but it would carry more weight as an indication of testamentary capacity at the moment had it been made spontaneously instead of brought about by a previous conversation initiated by the proponent."

2 *Isham v. Bingham*, 126 Ill. App. 513, affirmed in 227 Ill. 634, 81 N. E. 690; *Dorsey v. Sheppard*, 12 Gill & J. (Md.) 192, 37 Am. Dec. 77.

3 *Gill's Will*, 2 Dana (Ky.) 447.

4 *Lemann v. Bonsall*, 1 Add. Ecc. 389; *Scales v. Heirs of Thornton*, 118 Ga. 93, 44 S. E. 857; *Harp v. Adams*, 142 Ga. 5, 82 S. E. 246; *Estate of Wiley*, 187 Pa. St. 82, 67 Am. St. Rep. 569, 40 Atl. 980; *Estate of Rutt*, 200 Pa. St. 549, 50 Atl. 171.

"The court must be on its guard against importunity, more jealous

mony of testamentary utterances by a dying man, which from the nature of things would be extremely hard to disprove. The whole subject of nuncupative wills is largely statutory, and although in some cases it has been held that a substantial compliance with the requirements of the statute is sufficient,⁵ yet nuncupative wills have never been favored by the courts, and the prevailing doctrine is that statutes relating to them must be strictly construed and their requirements fully complied with.⁶

of capacity and more strict in requiring spontaneity and volition than it would in an ordinary case." — *Dorsey v. Sheppard*, 12 Gill & J. (Md.) 198, 37 Am. Dec. 77.

⁵ *Arnett v. Arnett*, 27 Ill. 247, 81 Am. Dec. 227; *Mulligan v. Leonard*, 46 Iowa 694; *Gwin v. Wright*, 8 Humph. (Tenn.) 639; *Ridley v. Coleman*, 1 Sneed (Tenn.) 616.

⁶ *Bennett v. Jackson*, 2 Phillim. 190; *Parsons v. Miller*, 2 Phillim. 194; *Harp v. Adams*, 142 Ga. 5, 82 S. E. 246; *Morgan v. Stevens*, 78 Ill. 287; *Dorsey v. Sheppard*, 12 Gill & J. (Md.) 192, 37 Am. Dec. 77; *Biddle v. Biddle*, 36 Md. 630; *Gibson v. Gibson, Walk.* (Miss.) 364; *Lucas v. Goff*, 33 Miss. 629; *Brown v. Brown*, 2 Murph. (N. C.) 350; *Rankin v. Rankin*, 9 Ired. (N. C.) 156; *Wester v. Wester*, 5 Jones (N. C.) 95; *Smith v. Smith*, 63 N. C. 637; *Burdick v. Haygood*, 106 N. C. 468, 11 S. E. 423; *Prince v. Hazleton*, 20 Johns. (N. Y.) 502, 11 Am. Dec. 307; *Yarnall's Will*, 1 Rawle (Pa.) 46, 26 Am. Dec. 115; *Taylor's Appeal*, 47 Pa. St. 31; *Estate of Wiley*, 187 Pa. St. 82,

67 Am. St. Rep. 569, 40 Atl. 980; *Estate of Rutt*, 200 Pa. St. 549, 50 Atl. 171; *Mitchell v. Vickers*, 20 Tex. 377.

"People have become so familiar with the use of the pen that oral testaments are looked upon with disfavor, since they are likely to be the subjects of fraud, perjury, mistake or misrecollection." — *Leathers v. Greenacre*, 53 Me. 561.

"The law wisely discriminates between written and unwritten wills, and permits the latter only in cases of urgent necessity. To abolish that distinction would be to abolish protection to property, to encourage frauds and perjuries, and to throw us back upon the usages of the unlettered ages." — *Prince v. Hazleton*, 20 Johns. (N. Y.) 502, 11 Am. Dec. 307.

It was said that nuncupative wills require more proof because of the possibility of fraud, facilities which must be counteracted by the courts insisting on the strictest proof as to every fact; and testamentary capacity and animus testandi at the time of the

However, a nuncupative will which makes no bequests, but merely appoints an executor, is not subject to the provisions of the Statute of Frauds.⁷

§ 185. Number of Witnesses to Nuncupative Wills.

Witnesses to nuncupative wills were required under the Roman law, also under the Statute of Frauds. The reason of the witnesses was not to give validity to the act of nuncupation, but in order that the oral testament might be proved. In matters of evidence we are not governed, in this country, by the civil law, and if the statutes in any particular jurisdiction in the United States do not prescribe the number of witnesses necessary to prove an oral will, no particular number is required. The court, however, must be satisfied by sufficient and competent evidence as to the substance of the oral dispositions of his property made by the deceased.⁸ In most American states, however, the number of witnesses is regulated by statute and, when a number is so prescribed, the statutory requirements must be strictly complied with. For instance, in a late case, in Georgia, where the statute required three witnesses, a nuncupative testament was rejected where, although two witnesses deposed that the deceased disposed of his estate in equal parts to two different persons, yet the third witness testified as to the disposition of one-half of the estate to one of the parties named but that he did not hear any

alleged nuncupation must be shown by the clearest and most indisputable evidence. — Yarnall's Will, 4 Rawle (Pa.) 46, 26 Am. Dec. 115.

⁷ Dorsey v. Sheppard, 12 Gill & J. (Md.) 192, 37 Am. Dec. 77.

⁸ Ex parte Thompson, 4 Bradf. (N. Y.) 154.

Unless the court is morally certain that the will propounded carries the real intentions of the testator, it is its duty to deny it the sanction of probate. — Yarnall's

statement with reference to the remainder.⁹ Of course if the oral testament is declared before an insufficient number of witnesses it would be invalid whether the witnesses were required to lend validity to the act or to prove the testament.¹⁰

§ 186. Committing the Spoken Words to Writing.

The Statute of Frauds provided that after the lapse of six months from its declaration, no nuncupative testament could be proved unless the words or the substance thereof had been committed to writing within six days after they had been spoken.¹¹ Similar provisions have been incorporated into the laws of the various states which sanction oral testaments of personal property by persons in the ordinary walks of life. The time within which the spoken words must be committed to writing varies in the different jurisdictions from three to sixty days. When a nuncupative will has been reduced to writing, it is no cause of nullity that it contains words not used by the testator provided it be clearly shown that it contains the true substance and import of the alleged nuncupation.¹² If, however, the writing fails

Will, 4 Rawle (Pa.) 46, 26 Am. Dec. 115.

⁹ Reid v. Wooster, 142 Ga. 359, 82 S. E. 1054, following Harp v. Adams, 142 Ga. 5, 82 S. E. 246.

¹⁰ Bundrick v. Haygood, 106 N. C. 468, 11 S. E. 423; Kennedy v. Douglas, 151 N. C. 336, 66 S. E. 216.

¹¹ Statute 29 Charles II, § 20.

¹² Starrs v. Mason, 32 La. Ann. 8; Landry v. Tomatis, 32 La. Ann. 113; Yarnall's Will, 4 Rawle (Pa.) 46, 26 Am. Dec. 115.

In Martinez v. De Martinez, 19 Tex. Civ. App. 661, 48 S. W. 532, it was held that the statute prohibiting the probate of a nuncupative will after six months from the time the testamentary words were spoken unless they, or their substance, should have been committed to writing within six days, is mandatory and no excuse for failing to proceed with the probate within the six months is availing.

to conform in substance to the words spoken, it is invalid, and evidence of such variance, if it exists, may be introduced in a contest to defeat a nuncupative will.¹³

§ 187. Evidence of Witnesses to Oral Testaments Must Substantially Agree.

The witnesses must agree as to the substance of the testamentary request made by the deceased, otherwise the court can make no disposition of the property. Where the statute requires a nuncupative will to be proved by a certain number of witnesses, if they can not substantially agree as to the words spoken or the bequests made by the testator there is a failure to comply with the statutory requirements and such a will must be rejected. And, further, if the bequests made by the testator are subsequently reduced to writing and it is at variance with the words spoken by the deceased, it must be rejected.¹⁴

§ 188. A Written Will Can Not Be Revoked by One That Is Oral.

The Statute of Frauds provided that no will in writing should be revoked, nor any clause, devise or bequest therein be altered, "by any words or will by word of mouth only, except the same be in the life of the testator committed to writing, and only after the writing thereof be read to the testator, and allowed by him and be proved to be so done by three witnesses at the least."¹⁵ The Statute of Wills provided that wills of personal

¹³ Harp v. Adams, 142 Ga. 5, 82 S. E. 246; Bolles v. Harris, 34 Ohio St. 38; Mitchell v. Vickers, 20 Tex. 337.

¹⁴ Harp v. Adams, 142 Ga. 5, 82 S. E. 246; Bolles v. Harris, 34 Ohio

St. 38; Mitchell v. Vickers, 20 Tex. 337.

¹⁵ Statute, 29 Charles II, § 21; Bac. Abr., Bouvier's ed., tit. Wills and Testaments, E; 2 Bl. Com. *500, *501.

property, as well as wills of realty, had to be in writing and executed with certain formalities,¹⁶ and that no such will or codicil, or any part thereof, could be revoked—otherwise than by marriage—except by another will or codicil executed in a like manner or by some writing declaring an intention to revoke the same and executed with the same formalities, or by burning, tearing, and the like.¹⁷ These provisions of the aforesaid statutes, particularly the latter, have been incorporated into the laws of the various states, and it may be said to be the universal rule that a duly executed testamentary writing can be revoked only in the form prescribed by the statute, which does not include revocation by word of mouth.¹⁸ Yet, although a nuncupative testament can not supersede a written will, it may dispose of an unbequeathed residue of lapsed legacies or of such portion of the personal estate as the testator, by fraud, may have been induced to bequeath by a prior written will.¹⁹

§ 189. Nuncupative Wills of Soldiers and Sailors Have Been Held Valid Although the Testators Had Ceased Their Privileged Callings.

Nuncupative wills made by those in the ordinary walks of life can be made only in the “last sickness,” therefore recovery would automatically revoke such a testament; for if a man regains his health, a former illness could not be termed his “last sickness.”²⁰ As to soldiers in actual military service and mariners and seamen at sea, the fact that they come within the exception of the statute

¹⁶ Statute, 1 Vict., ch. 26, § 9.

¹⁷ Statute, 1 Vict., ch. 26, § 20.

¹⁸ *McCune v. House*, 8 Ohio 144,

¹⁹ *Stonywel's Case*, Raym. T.

334.

²⁰ 2 Bl. Com. *501.

³¹ *Am. Dec.* 438; *Brook v. Chapel*, 34 Wis. 405

is authority for them to make oral testaments of personal property irrespective of physical condition. Neither the Statute of Frauds nor the Statute of Wills provided in terms that the nuncupative testaments of the privileged classes should be revoked by the safe return of the testator from a military expedition or an ocean voyage, but merely stated that soldiers and seamen, under the circumstances we have referred to, could dispose of their personal estate the same as before said acts were passed. The laws of England and of most of the jurisdictions of the United States, having fixed no limitation of time or set of circumstances which would cause the annulment of the nuncupative wills of soldiers and sailors, such testaments have been admitted to probate although the testators, at the time of death, had long ceased to belong to either of the privileged classes. In England, a nuncupative will made by a soldier while in active service in 1844, was admitted to probate although he returned to England in 1845 and remained there until his death in 1852.²¹ In a New York case, the court, after stating that the will of a sailor at sea did not have to be made in the time of sickness, said: "In submitting to this view it may well be remarked that its dangerous effect is that a mariner's oral will, once made at sea, may remain for his lifetime, and may be proved by the mouth of two witnesses, however long after the event and however ample the testator's opportunity for a deliberate statutory will may have been in the meantime."²²

²¹ Goods of Leese, 17 Jur. 216.

²² In re Connor's Will, 65 Misc. Rep. 403, 121 N. Y. Supp. 903.

In the Will of Smith, 6 Phila. (Pa.) 104, the court said: "For it must be borne in mind, that the

statute of Charles II and our Act of Assembly are not guarded as was the Code of Justinian, or the most of those of modern Europe. They confined their legal disposition of the soldier's intention to a

§ 190. The Same Subject: Criticism of the Rule.

This rule, however, does not seem to be based on solid reasoning. The law of nuncupative testaments of soldiers and sailors was adopted from the civil law, the statutes generally prescribing that such wills can be made the same as before the passage of the act regulating wills. The rule of the civil law was that such privileged testaments should be void within a specified time after the testator had returned home or to some place where he had the opportunity to make a will in the ordinary manner.²³ Such is the rule in Louisiana where the law follows the Code Napoleon. In that state oral testaments of soldiers and sailors become void "after the return of the testator to a place where he has an opportunity to employ the ordinary forms."²⁴ In the case of soldiers, the time limit is six months, as to sailors, three months.²⁵ Soldiers and sailors may make oral testaments because of the peculiar characters of their callings, but when the reason for the privilege ceases, it is difficult to see upon what foundation—certainly not the civil law—the principle can be based that such wills remain valid no matter what the change of conditions may be.

period of three months from the time of making it, and if it continued longer it must be repeated or renewed. Ours is unlimited in time and indefinite in amount, provided it is confined to personal estate. Such declarations, unless subsequently revoked, might be set up as a will on the death of a soldier, although he had long since been discharged from the

service and returned to his home; for if once valid, it would so remain until altered or annulled."

²³ Cod. Civ. L. III, tit. II, s. 11, § 984.

²⁴ Louisiana Civ. Code, art. 1600, being a literal copy of the Code Napoleon 984.

²⁵ Louisiana Civ. Code, arts. 1600, 1604. See, also, Code Napoleon 987, 995, 996.

CHAPTER X.

DONATIONS MORTIS CAUSA.

- § 191. Origin of donations *mortis causa*.
- § 192. Definition by Lord Cowper.
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- § 197. Donor must intend that title shall become absolute in donee only in the event of his death.
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- § 201. The same subject: A serious operation.
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- § 203. Real property can not be the subject of a donation *mortis causa*.
- § 204. The presumption as to the conditions imposed by law.
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- § 209. Effect of the donor's declaration that the gift is to be effective if he dies.
- § 210. Declarations of intention to give, without delivery of property, are testamentary in character.

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- § 221. Choses in action as the subject of a donation *mortis causa*: Changes in the rule.
- § 222. The same subject: Where endorsement precludes payment until after the donor's death.
- § 223. Deposits in savings banks: Delivery of pass book.
- § 224. Promissory notes as the subject of the gift.
- § 225. Checks and drafts: Not subjects of gifts *mortis causa*.
- § 226. The same subject: Decisions to the contrary.

§ 191. Origin of Donations Mortis Causa.

Donations *mortis causa* are of early origin, being derived from the civil law.¹ The rules, however, which govern them have been greatly modified both in England and in the United States.² The modern rule is that such gifts can be made only when the donor is in apprehension or peril of death, whereas the civil law recognized two additional classes: (1) where the donor, "not in *periculo mortis*, but moved by a general consideration of man's mortality, made a gift"; and (2) where the donor, in the face of a present peril, "gave so that the subject of the

1 Inst. Just., lib. 2, tit. 7, § 1. 431; Irish v. Nutting, 47 Barb.

2 Ward v. Turner, 2 Ves. Sen. (N. Y.) 370.

gift was immediately made the property of the donee," such gift being irrevocable.³ Under modern rulings the last two instances mentioned are classified as mere gifts *inter vivos* and do not fall under the present definition of gifts *mortis causa*. The distinction between those additional gifts above mentioned which were recognized under the civil law and that which under the modern practice in England and in the United States is designated as a donation *mortis causa*, was recognized by the Civilians, they holding the latter not a gift until the maker's death.⁴

§ 192. Definition by Lord Cowper.

The early definition of donations *mortis causa*, given by Lord Cowper, has often been quoted. It is "where a man lies in extremity, or being surprised with sickness, and not having an opportunity of making his will, but lest he should die before he could make it, he gives with his own hands his goods to his friends about him; this, if he dies, shall operate as a legacy; but if he recovers, then does the property thereof revert to him."⁵ This definition, with some modifications, has been generally followed, but the rule now is that it is not necessary that

³ Swinburne, Wills, pt. 1, § 7; *Phinney v. State*, 36 Wash. 236, 68 L. R. A. 119, 78 Pac. 927.

⁴ In *Agnew v. Belfast Banking Co.*, (1896) 2 Ir. Rep. 204, Fitzgibbon, L. J., says: "In applying quotations from the Civilians, we must always remember that they divide *donationes mortis causa* into three classes, only one of which is recognized as such by our law. The Civilians include—(a) testamentary gifts; and (b)

gifts taking effect immediately as gifts *inter vivos*, but conditional or defeasible, upon the death of the donor or of the donee."

⁵ *Hedges v. Hedges*, Prec. Ch. 269.

Swinburne, Wills, pt. 1, § 7, defines a *donatio mortis causa* as "when any being in peril of death doth give something, but not so that it shall be presently his that received it, but in case the giver do die."

the donor be *in extremis*; it is sufficient if he be in peril of death from some imminent or impending cause or in apprehension of death by reason of illness.⁶

§ 193. Distinguished from Gifts Inter Vivos: Definition.

A gift *mortis causa* has many of the elements of a gift *inter vivos*, but there are distinguishing features. A gift *mortis causa* may be made only when the donor is in apprehension or peril of death; further, the gift is conditional, being subject to revocation by the donor at any time before his death, and is revoked by law should the donor escape the peril or recover from his illness or outlive the donee. With gifts *inter vivos*, the title passes immediately upon delivery and the gift is irrevocable.⁷ It is rather difficult to give a full and complete definition of a donation *mortis causa* except by stating its various elements, and each of such elements is subject to a separate and distinct construction. Generally speaking, a donation *mortis causa* may be said to be a transfer of personal property accomplished by delivery and acceptance, from a donor who is in peril or apprehension of death, and who makes such transfer in view of such peril or apprehension, the gift being revocable by the donor during his life, and being annulled by law should the donor escape from the peril, recover from the illness, or survive the donee.

⁶ *Irish v. Nutting*, 47 Barb. (N. Y.) 370; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 11 L. R. A. 684, 26 N. E. 627.

The early rule of the common law was that donations *mortis causa* could be made only in the
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last illness of the donor.—*Blount v. Burrow*, 1 Ves. Jun. 546.

⁷ In re *Elliott's Estate*, 159 Iowa 107, 140 N. W. 200; *Northrip v. Burge*, 255 Mo. 641, 164 S. W. 584; *Bedell v. Carll*, 33 N. Y. 581, 584; *Irish v. Nutting*, 47 Barb. (N. Y.) 370; *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 11

§ 194. Distinguished from Testamentary Dispositions: Rights of Creditors.

A donation *mortis causa* resembles a nuncupative will in that either can be revoked by the maker, neither becomes effective until the maker's death, and both deal only with personal property. A nuncupative will, except when made by a soldier in actual military service or a mariner or seaman at sea, can be made only when the testator is *in extremis*; with a gift *mortis causa*, although it is not necessary that the donor be *in extremis*, he must be in fear or apprehension of death. There is this distinction, however, the personal property which is the subject of a donation *mortis causa* must be delivered, either actually or constructively, by the donor; whereas, with a nuncupative will, no delivery is required.⁸ As to legacies, they are ambulatory in character, revocable at the pleasure of the maker and do not become effective until his death, but they differ from donations *mortis causa* since delivery of legacies is not required. Again, nuncupative wills must be probated, and any beneficiary thereunder, or the legatee under any will, acquires his interest in the property through the personal representative of the deceased; whereas the donee of a gift *mortis causa* since delivery of legacies is not required. Again, donor and adverse to his personal representative.⁹ Legacies and donations *mortis causa*, however, have this in common, that both may be abated if the assets of the estate are insufficient to satisfy the claims of creditors. The donee of a gift *mortis causa* takes the property sub-

L. R. A. 684, 26 N. E. 627; O'Gorman v. Jolley, 34 S. D. 26, 147

431, 436; Tygard v. McComb, 54 Mo. App. 85.

N. W. 78.

⁹ Thompson v. Hodgson, 2 Stra.

⁸ Ward v. Turner, 2 Ves. Sen. 777; Tate v. Hilbert, 2 Ves. Jun.

ject to the right of the administrator of the estate of the donor to reclaim it if it is necessary for the payment of the debts of the deceased.¹⁰

§ 195. The Right to Make Donations Mortis Causa: Not a Fraud Against Rights of Wife or Children.

Donations *mortis causa* have been recognized for centuries, the disposition of personal property by such a gift being a fixed principle of jurisdiction in all civilized countries.¹¹ It is a well settled principle that a man may, during his lifetime, dispose of his personal property in any manner he may desire and, even though he may do so by a voluntary gift, he does not thereby commit a fraud against the rights of his wife and children. While he lives his wife and children have no vested interest in his personal property; what right they have attaches only after his death; therefore a man during his lifetime may transfer his personal property as an absolute gift,

111, 120; Tygard v. McComb, 54 Mo. App. 85.

10 Ward v. Turner, 2 Ves. Sen. 431, 434; Basket v. Hassell, 107 U. S. 602, 27 L. Ed. 500, 2 Sup. Ct. 415; Larrabee v. Hascall, 88 Me. 511, 51 Am. St. Rep. 440, 34 Atl. 408; Mitchell v. Pease, 7 Cush. (Mass.) 350; Phinney v. State, 36 Wash. 236, 68 L. R. A. 119, 78 Pac. 927. See, also, Blake v. Jones, 1 Bailey Eq. (S. C.) 141, 21 Am. Dec. 530.

In Chase v. Redding, 13 Gray (Mass.) 418, Chief Justice Shaw says: "A man is bound to be just before he is generous. Creditors have claims on the justice and legal duty of the debtor, while do-

nees, legatees and heirs, having paid nothing, are volunteers, and have claims only on his bounty."

11 Baber v. Caples, 71 Ore. 212, Ann. Cas. 1916C, 1025, 138 Pac. 472; Johnson v. Colley, 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721.

"Gifts causa mortis as well as gifts inter vivos are based upon the fundamental right every one has of disposing of his property as he wills. The law leaves the power of disposition complete, but to guard against fraud and imposition, regulates the methods by which it is accomplished."—Ridden v. Thrall, 125 N. Y. 572, 21 Am. St. Rep. 758, 11 L. R. A. 684, 26 N. E. 627.

in trust or otherwise, and no one can complain. Such gifts or transfers, if made by a competent person and fully executed, in the absence of fraud, duress or undue influence, are perfectly valid.¹²

§ 196. Married Women May Make Gifts *Mortis Causa*.

A married woman may be the donee of a gift *mortis causa* the same as she may be the recipient of any gift, and the presumption is that the property was given to her for her separate use.¹³ Donations *mortis causa* between husband and wife were sanctioned by the civil law and this rule was early followed in England.¹⁴ As to her personal estate, a married woman has the same power of transferring it by gift *mortis causa* as she has of disposing of it by will,¹⁵ although in a Massachusetts case it was held that the testamentary restrictions placed by the statute upon married women did not apply to such gifts.¹⁶ The same mental capacity is required to make a gift *mortis causa* as is required to make a will, and there must be the same freedom from fraud, duress, or undue influence.¹⁷ These matters will be dealt with later.

¹² Ellmaker v. Ellmaker, 4 Watts (Pa.) 89; Dickerson's Appeal, 115 Pa. 198, 2 Am. St. Rep. 547, 8 Atl. 64; Lines v. Lines, 142 Pa. 149, 24 Am. St. Rep. 487, 21 Atl. 809; Young's Estate, 202 Pa. 431, 51 Atl. 1036; Windolph v. Girard Trust Co., 245 Pa. St. 349, 91 Atl. 634; Hall v. Hall, 109 Va. 117, 21 L. R. A. (N. S.) 533, 63 S. E. 420.

¹³ Baxter v. Bailey, 8 B. Mon. (Ky.) 336; Gardner v. Gardner, 22

Wend. (N. Y.) 526, 34 Am. Dec. 340; Meach v. Meach, 24 Vt. 591.

¹⁴ Inst. Just., pt. 2, tit. 7, § 3; Lawson v. Lawson, 1 P. Wms. 441; Miller v. Miller, 3 P. Wms. 356; Jones v. Selby, Prec. Ch. 300.

¹⁵ Jones v. Brown, 34 N. H. 439.

¹⁶ Marshall v. Berry, 13 Allen (Mass.) 43.

¹⁷ Ross v. Conway, 92 Cal. 632, 28 Pac. 785; Woodbury v. Woodbury, 141 Mass. 329, 55 Am. Rep. 479, 5 N. E. 275; Sass v. McCormack, 62 Minn. 234, 64 N. W. 385.

§ 197. Donor Must Intend That Title Shall Become Absolute in Donee Only in the Event of His Death.

There is no principle of law which prevents a person in apprehension or peril of death, or even *in extremis*, from making a valid gift *inter vivos*. A qualified donor can, at any time, make a present gift without condition or limitation arising either from his own intentions or by implication of law. A gift made by a person, even *in extremis*, accompanied by the other elements necessary to perfect the gift, with the intent that title shall pass immediately and irrevocably, is valid as a gift *inter vivos*. A donation *mortis causa*, therefore, must not only be made by a donor in peril or apprehension of death, but must be made in view of such a condition and conditioned thereon.¹⁸

§ 198. Revocation of the Gift by the Donor.

A gift *mortis causa* may be revoked by the donor at any time during his life.¹⁹ Such revocation may be made by

¹⁸ Keller v. McConville, 175 Mich. 479, 141 N. W. 652. See, also, Irons v. Smallpiece, 2 Barn. & Ald. 551; Tate v. Leithead, Kay, 658; Gilligan v. Lord, 51 Conn. 562; Cowdrey v. Barksdale, 16 Ga. App. 387, 85 S. E. 617; Dresser v. Dresser, 46 Me. 48; In re Heiser's Estate, 147 N. Y. Supp. 557, 85 Misc. Rep. 271; Phinney v. State, 36 Wash. 236, 68 L. R. A. 119, 78 Pac. 927; Henschel v. Maurer, 69 Wis. 576, 2 Am. St. Rep. 757, 34 N. W. 926.

In Agnew v. Belfast Banking Co. (1896), 2 Ir. Rep. 204, Fitzgibbon, L. J., says: "The motive of a gift *inter vivos* is that the per-

son to whom it is given should have it and keep it, but the motive of a *donatio mortis causa* is to let it take effect only when self-interest is at an end, and the desire to retain the object through the love of life is still stronger than the desire to give it to the donee."

In Cowdrey v. Barksdale, 16 Ga. App. 387, 85 S. E. 617, it was held that not only must a gift *mortis causa* be made where the donor was seriously ill or in apprehension of death, but the intention must be that the gift is to be absolute only in the event of the donor's death.

¹⁹ Basket v. Hassell, 107 U. S.

the donor again assuming possession of the property which was the subject of the gift, any resumption of control and dominion over the property by the donor amounting to a revocation.²⁰ Such a gift, however, is not revoked should the donor subsequently make a will bequeathing to some one other than the donee the property which was the subject of the gift, since the title of the donee becomes absolute at the moment of the donor's death and his right, by relation, dates from the time of delivery.²¹ If, however, the donor make a legacy of the same property to the donee, the gift is satisfied or the donee may elect under which he will take.²²

§ 199. It Is Necessary That There Be Peril or Apprehension of Death, With Fatal Result.

Under the civil law a present peril or apprehension of death was not necessary, the general consideration of the mortality of man or the possible dangers which might be encountered upon taking a long journey being sufficient. The modern rule is that the donor must be in apprehension of death because of some illness, or confronted by some immediate peril which endangers his life. If the gift is made because of some sickness or malady with which the donor is afflicted and because of which he is in apprehension of death, it is not necessary

602, 27 L. Ed. 500, 2 Sup. Ct. 415; Bickford v. Mattocks, 95 Me. 547, 50 Atl. 894; Bieber's Admr. v. Boeckmann, 70 Mo. App. 503; Northrip v. Burge, 255 Mo. 641, 164 S. W. 584; Gale v. Drake, 51 N. H. 78; Matter of Manhardt (Estate of Seitz), 17 App. Div. 1, 44 N. Y. Supp. 836.

20 Ward v. Turner, 2 Ves. Sen.

431, 436; Bunn v. Markham, 7 Taunt. 232; Hatch v. Atkinson, 56 Me. 324, 96 Am. Dec. 464; O'Gorman v. Jolley, 34 S. D. 26, 147 N. W. 78.

21 Jones v. Selby, Prec. Ch. 300; Brunson v. Henry, 140 Ind. 455, 39 N. E. 256.

22 Jones v. Selby, Prec. Ch. 300; Johnson v. Smith, 1 Ves. Sen. 311.

that he be *in extremis* or die in the very near future, but it is essential, however, that he do not recover from his illness, or, if the gift be made because of some present and imminent peril which endangers his life, that he do not survive such peril.²³ In a New York case, however,

23 *Agnew v. Belfast Banking Co.* (1896), 2 Ir. Rep. 204; *Gilligan v. Lord*, 51 Conn. 562; *Cowdrey v. Barksdale*, 16 Ga. App. 387, 85 S. E. 617; *Donover v. Argo*, 79 Iowa 574, 44 N. W. 818; *Stokes v. Sprague*, 110 Iowa 89, 81 N. W. 195; *Hogan v. Sullivan*, 114 Iowa 456, 87 N. W. 447; *Barto v. Harrison*, 138 Iowa 413, 116 N. W. 317; *In re Elliott's Estate*, 159 Iowa 107, 140 N. W. 200; *Larrabee v. Hascall*, 88 Me. 511, 51 Am. St. Rep. 440, 34 Atl. 408; *Keller v. McConville*, 175 Mich. 479, 141 N. W. 652; *In re Heiser's Estate*, 147 N. Y. Supp. 557, 85 Misc. Rep. 271; *Danzinger v. Seamen's Bank for Savings*, 86 Misc. Rep. 316, 149 N. Y. Supp. 207; *Irish v. Nutting*, 47 Barb. (N. Y.) 370; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Williams v. Guile*, 117 N. Y. 343, 349, 6 L. R. A. 366, 22 N. E. 1071; *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 11 L. R. A. 684, 26 N. E. 627; *Phinney v. State*, 36 Wash. 236, 68 L. R. A. 119, 78 Pac. 927; *Newsome v. Allen*, 86 Wash. 678, 151 Pac. 111; *Henschel v. Maurer*, 69 Wis. 576, 2 Am. St. Rep. 757, 34 N. W. 926.

In *Larrabee v. Hascall*, 88 Me. 511, 51 Am. St. Rep. 440, 34 Atl. 408, where the donor did not die for one and a half months after

making the gift, yet as he was suffering at the time from a sickness from which he afterwards did die, it was held that he was in apprehension of death, being then so sick as to require a nurse, and the sickness having continued to increase until it terminated in his death.

In *Van Fleet v. McCarn*, 2 N. Y. Supp. 675, where the donor was afflicted only with rheumatism, the infirmities of old age being the principal reason for her apprehension of death, she living fourteen months after making the gift and dying suddenly from another and acute ailment, it was held that there was no showing that the donor was under the apprehension of immediate death when the gift was made.

In *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313, it was held that where the donor was nearly eighty years of age and in failing health which so continued until his death five months later, there being no specific evidence as to the nature of the illness of the deceased, the court could not say as a matter of law that he was not acting in view or apprehension of death. The court stated that "the only rule is that he must not recover from that illness."

where a gift was made in apprehension of death from an operation to be performed for hernia, which operation did not appear to be dangerous and which was in fact successful, but where the donor died of heart disease with which he had been suffering before he went to the hospital, it was held a good donation *mortis causa*. The court uses language from which it might be inferred as holding that it is not necessary that the donor die from the exact disease which he feared at the time of making the gift and that it is sufficient if death occurs from some other disease not at the time known. The court said, however, that in this particular case it could not be determined to what extent the fear of heart disease caused the making of the gift or whether, except for the operation, it would have been fatal at that time, and the decision was strictly limited to the facts of the case.²⁴

§ 200. Peril or Apprehension of Death Which Is Sufficient to Sustain the Donation.

Although the rule is, generally speaking, other conditions being satisfied, that one in peril or apprehension of immediate or approaching death may make a gift *mortis causa*, yet not all perils or fears are sufficient to satisfy the rule. Probable dangers to be encountered on a journey by rail or water, by horse or automobile, do not suffice. A soldier at home on a furlough and in good health, although about to depart for the field of active operations,

In *Williams v. Guile*, 117 N. Y. 343, 349, 6 L. R. A. 366, 22 N. E. 1071, the donor was suffering from paralysis, from a stroke of which he subsequently died. The court held it was not necessary for the donor, in such a case, to have been confined to his bed when he made

the gift, or that death occurred within a limited time; but only that when he died, it must have been of the disease which he feared when he made the gift.

²⁴ *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 11 L. R. A. 684, 26 N. E. 627.

can not make a gift *mortis causa*.²⁵ One in delicate health, both lungs being affected, who attempted to make a gift just prior to his departure for a sanitarium where he "hoped he would get well, but he had his doubts about it," and where he died of the malady some eleven months later, was held not to have been in apprehension of death. The court said the deceased went to the sanitarium to get well, not for the purpose of dying.²⁶

§ 201. The Same Subject: A Serious Operation.

A person who is suffering from some illness or malady requiring an operation from which he thereafter dies, may, just prior to such operation, be said to be in apprehension of death. Although he voluntarily exposes himself to the danger, yet it is made necessary by reason of an existing disease and, death ensuing, the disease may be said to be the proximate cause.²⁷

§ 202. The Same Subject: One Contemplating Suicide Is Not "In Apprehension of Death."

A donation *mortis causa* made by one who was in contemplation of suicide which he immediately carried out, should not be upheld. One who voluntarily seeks death can not be said to be in apprehension or fear of death. Further, to sustain such a gift would be contrary to public policy, for it would be giving validity to that which

²⁵ *Irish v. Nutting*, 47 Barb. (N. Y.) 370; *Gourley v. Linsenbiger*, 51 Pa. St. 345.

Compare: *Gass v. Simpson*, 4 Cold. (Tenn.) 288.

²⁶ *Danzinger v. Seamen's Bank for Savings*, 86 Misc. Rep. 316, 149 N. Y. Supp. 207. See, also: *Staniland v. Willott*, 3 Macn. & G. 664;

Weston v. Hight, 17 Me. 287, 35 Am. Dec. 250.

²⁷ *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 11 L. R. A. 684, 26 N. E. 627.

In *Newsome v. Allen*, 86 Wash. 678, 151 Pac. 111, an alleged donation *mortis causa* made by a woman to her sister before going

could become effective only by reason of the self destruction of the donor.²⁸ In the United States, generally, although attempted suicide is a crime, yet it is not if it ends fatally; but in those jurisdictions where the rule is more strict, there would be the additional reason for holding such a gift invalid, for otherwise it would be sustained only because of the commission of a criminal offense. And the same rule applies where the donor suffers capital punishment.²⁹

§ 203. Real Property Can Not Be the Subject of a Donation *Mortis Causa*.

It is only personal property that may be the subject of a donation *mortis causa*. It has been said that under the Roman law, real property as well as personal property could be the subject of such a gift.³⁰ This rule has never prevailed in England or in the United States, and it may be questioned whether it existed under the civil law with reference to the English form of a donation *mortis causa* since it recognized two additional forms which would not be included in the modern definition of such a gift. Judge Redfield, after quoting the definition given in the Institutes of Justinian³¹ of a *donatio mortis causa*, said that such a gift would not include real property, even though conveyed by deed. He held that a deed of realty, although made in apprehension of death, was a

to a hospital, where she died five days later, was held invalid, the court stating that she had not been in *periculo mortis*; but the case, however, was really decided on the point that there was a lack of delivery. See, also, *Fauley v. McLaughlin*, 80 Wash. 547, 141 Pac. 1037.

²⁸ *Bainbridge v. Hoes*, 149 N. Y. Supp. 20, 163 App. Div. 870.

²⁹ *Agnew v. Belfast Banking Co.* (1896), 2 Ir. Rep. 204, 223.

³⁰ *Irish v. Nutting*, 47 Barb. (N. Y.) 370.

³¹ Justin. Inst., lib. 2, tit. 7.

testamentary disposition and void, saying: "A gift of real property can not be sustained as a *donatio mortis causa*, for that only extends to personalty."³² This is the universal rule in England and America and all decisions which attempt to fully define donations *mortis causa* include therein the fact that they apply only to personalty. The decisions, however, give no satisfactory reason for this rule, but it is a salutary one. It is well established that personal property can pass by delivery, whereas, since the Statute of Frauds, no transfer of real property is valid unless the same be in writing. Written contracts should not be altered by oral declarations, therefore the instrument of transfer of real property must speak for itself and contain all the provisions, conditions or limitations affecting the conveyance. In some instances symbolic delivery is necessary with reference to personal property not capable of manual delivery, and the same could have been said of real property when livery of seisin was in vogue. Since the Statute of Frauds, however, livery of seisin is no longer permissible, nor under the various statutes regarding wills can any devise of real property be made except by a duly executed written instrument. The various statutes have been passed for the prevention of frauds.

Again, personal property is liable to be lost, wherein it differs from realty. A deed of realty becomes effective only upon delivery. The grantor may insert in the deed any valid conditions he desires as to when the title shall vest in the grantee, but the deed to be valid must be delivered and, if delivered, can not be revoked by the grantor. In this it differs from a gift *mortis causa* since the latter

³² Meach v. Meach, 24 Vt. 591. 89 Me. 167, 36 Atl. 108; Houghton See, also, Wentworth v. Shibbes, v. Houghton, 34 Hun (N. Y.) 212.

is annulled in the event of certain conditions which are imposed by law. A deed undelivered, although to take effect after the happening of some future event such as the death of the grantor,³³ or a deed deposited by the grantor with another, the grantor reserving the right to recall or control the deed, transfers no interest to the grantee.³⁴

§ 204. The Presumption as to the Conditions Imposed by Law.

A donation *mortis causa* becomes complete and effective only in the event that the donor does not survive the impending peril or recover from the illness which caused the apprehension of death, and, further, that the donee survive the donor, and that the donor prior to his death does not revoke the gift. These are conditions imposed by law and they need not be declared by the donor. Where one in fear of death from an immediate peril or present illness makes a gift of personal property, the law infers that the giver intended the donee to have the property only on the conditions above mentioned. As has been before stated, a person in apprehension of death can make a gift *inter vivos* and facts and circumstances surrounding the transaction may show that such was intended. In the absence of such evidence, however, the inference of the law prevails.³⁵

³³ *Latshaw v. Latshaw*, 266 Ill. 44, 107 N. E. 111.

³⁴ *Dickson v. Miller*, 124 Minn. 346, 145 N. W. 112; *Wortz v. Wortz*, 128 Minn. 251, 150 N. W. 809; *Wilson v. Bridgeforth*, 108 Miss. 199, 66 So. 524; *Owings v. First National Bank*, 97 Neb. 257, 149 N. W. 777.

³⁵ *Tate v. Hilbert*, 2 Ves. Jun.

111; *Gardner v. Parker*, 3 Mad. 184; *Agnew v. Belfast Banking Co.* (1896), 2 Ir. Rep. 204; *Basket v. Hassell*, 107 U. S. 602, 27 L. Ed. 500, 2 Sup. Ct. 415; *Bickford v. Mattocks*, 95 Me. 547, 50 Atl. 894; *Bieber's Admr. v. Boeckmann*, 70 Mo. App. 503; *Foley v. Harrison*, 233 Mo. 460, 136 S. W. 354, *Northrip v. Burge*, 255 Mo.

§ 205. Confusion of Opinion as to the Exact Nature of Donations Mortis Causa.

Because of the fact that a donation *mortis causa* may be said to be ambulatory in its nature by reason of the conditions imposed by law, some confusion has arisen as to its exact character, whether it is a perfected gift liable to be annulled only upon the occurrence of conditions subsequent, or whether it is an indeterminate transaction which can ripen into a gift only in the event of certain contingencies. The Civilians placed the English form of a donation *mortis causa* in a special class, having held it not to be a gift at all until the death of the donor. In this connection Fitzgibbon, L. J., says: "In this matter the Civilians are more accurate than those judges and text writers who have sometimes slipped into language which introduces the idea of revocability, as distinguished from futurity or imperfection."³⁶ In an early New York case the following language was used: "A *donatio mortis causa* takes effect from the time the

641, 164 S. W. 584; *Gale v. Drake*, 51 N. H. 78.

Matter of Manhardt (Estate of Seitz), 17 App. Div. 1, 44 N. Y. Supp. 836; *Danzinger v. Seamen's Savings Bank*, 86 Misc. Rep. 316, 149 N. Y. Supp. 207; *Irish v. Nutting*, 47 Barb. (N. Y.) 370; *Harris v. Clark*, 3 N. Y. 93, 51 Am. Dec. 352; *Bedell v. Carll*, 33 N. Y. 581, 584; *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 11 L. R. A. 684, 26 N. E. 627; *Kiff v. Weaver*, 94 N. C. 274, 55 Am. Rep. 601; *O'Gorman v. Jolley*, 34 S. D. 26, 147 N. W. 78; *Seabright v. Seabright*, 28 W. Va. 412; *Phinney v. State*,

36 Wash. 236, 68 L. R. A. 119, 78 Pac. 927.

³⁶ *Agnew v. Belfast Banking Co.* (1896), 2 Ir. Rep. 204.

In the case just cited, at p. 223, Fitzgibbon, L. J., goes further and says: "Therefore, according to the civil law, and our law is the same, in the case of a *donatio mortis causa*, in the English sense, you must look to the capacity of the donor at the time of death to see if at that time he has power to make the gift, which though made before does not take effect till then." See, also, *Cowdrey v. Barksdale*, 16 Ga. App. 387, 85 S. E. 617. To

gift is made, but is revocable during the life of the donor. If not revoked during his life, the *title* becomes absolute upon his death; and by relation from the time of delivery."³⁷ In a comparatively recent case in Virginia, the Court says: "The *title* to every gift *causa mortis* must vest in the donee at the time of the gift. It vests, however, subject to certain conditions subsequent. The donor may revoke the gift during his life, or it will be defeated by operation of law if the donor should recover from the illness which induced the gift, or should survive the donee. If it is not revoked or defeated by operation of law, it becomes absolute at the donor's death, but not until then."³⁸

Undoubtedly courts in many instances have used language in connection with this matter without having had in mind the particular point at issue. As will be shown hereafter, the *property* must pass by delivery at the time the gift *mortis causa* is made; but as to the *title* to the property, it remains in the donor until the moment of his death. The *property* must pass out of the possession and control of the donor and the donee may be said to have an equitable interest in it, but such interest is inchoate and defeasible until the happening of a certain

the same effect; see: *Basket v. Hassell*, 107 U. S. 602, 27 L. Ed. 500, 2 Sup. Ct. 415, quoting with approval the case of *Gass v. Simpson*, 4 Cold. (Tenn.) 288.

³⁷ *Harris v. Clark*, 3 N. Y. 93, 114, 51 Am. Dec. 352. See, also: *Irish v. Nutting*, 47 Barb. (N. Y.) 370; *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 11 L. R. A. 684, 26 N. E. 627; *Walter v. Hodge*, 2 Swanst. 98.

In *O'Gorman v. Jolley*, 34 S. D. 26, 147 N. W. 78, the court says: "A gift *causa mortis* is a gift in contemplation of approaching death, the intent accompanied by delivery. Both the intent and the delivery are accompanied by conditions imposed by law, any one of which may operate as a defeasance of the gift."

³⁸ *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721.

event, and not until then does the title in the donee become absolute. With reference to the *title* to the property, the interest of the donee is incomplete during the lifetime of the donor, therefore it can not be said that there is a perfected gift until the donor's death.

§ 206. Evidence Necessary to Establish the Gift: Witnesses.

Under the civil law, five witnesses were required to establish a donation *mortis causa*, but the rule today in England and in the United States is that such gifts may be proved even by a single witness.³⁹ Formerly, when the rule existed that no one could give evidence for himself, a donation *mortis causa* could have been established only by testimony other than that of the donee.⁴⁰ The rule of today, however, is merely that such a gift must be established by clear and convincing proof. The rule of the civil law has been disregarded, as has the rule that a formally executed will requires witnesses other than those who may be beneficiaries under it. An holographic will is, of course, not witnessed; but, being entirely in the handwriting of the testator, it may be presumed to be a correct declaration of his intentions. It is a general principle of evidence, however, that if any witness testifies under the influence of bias or gain, his testimony is to be viewed with distrust, and this principle would apply where the donee of a gift *mortis causa* sought to

³⁹ *McConnell v. Murray*, 3 Ir. Eq. Rep. 465; *Irish v. Nutting*, 47 Barb. (N. Y.) 370.

In *Stewart v. Stokes*, 177 Mo. App. 390, 164 S. W. 156, the court says: "At one time, such gifts were invalid, in the civil law, unless attested by five witnesses; and,

though this caused many to fall that were really intended by the donor, it was thought to suffer that injustice, since it was small, as compared to the wholesale plunder sure to follow the removal of such restraint."

⁴⁰ *Williams, Exec.*, * 661.

establish the same by his own uncorroborated testimony. Such a gift should not be established except by the testimony of one or more disinterested witnesses.

§ 207. The Same Subject: Burden of Proof.

The burden of proof is upon the person seeking to establish a donation *mortis causa*. All facts necessary to constitute such a gift must be clearly proved, there being no presumption in its favor, for the law does not presume that a party will voluntarily part with his property. This does not mean, however, that the law presumes that such a gift was not made, the rule being that there is no presumption either in favor of or against the gift. But because of the opportunity for fraud, the courts will carefully scrutinize all of the facts, and the proof necessary to establish a donation *mortis causa* must be strong and convincing.⁴¹ Ordinarily it

⁴¹ Walter v. Hodge, 2 Swanst. 92; Cosnahan v. Grice, 15 Moore P. C. C. 215; In re Liphart, 227 Fed. 135; Hitch v. Davis, 3 Md. Ch. 266; Drew v. Hagerty, 81 Me. 231, 10 Am. St. Rep. 255, 3 L. R. A. 230, 17 Atl. 63; Gray v. Doubikin, 188 Mo. App. 667, 176 S. W. 514; Tygard v. Falor, 163 Mo. 234, 63 S. W. 672; Matter of Swade, 65 App. Div. 592, 72 N. Y. Supp. 1030; Lehr v. Jones, 74 App. Div. 54, 77 N. Y. Supp. 213; Danzinger v. Seamen's Bank for Savings, 86 Misc. Rep. 316, 149 N. Y. Supp. 207; Lewis v. Meritt, 113 N. Y. 386, 21 N. E. 141; Devlin v. Greenwich Savings Bank, 125 N. Y. 756, 26 N. E. 744; Waite v. Grubbe, 43 Ore. 406, 99 Am. St. Rep. 764, 73 Pac. 206; Baber v.

Caples, 71 Ore. 12, Ann. Cas. 1916C 1025, 138 Pac. 472; Wells v. Tucker, 3 Bin. (Pa.) 366; Blake v. Jones, 1 Bailey Eq. (S. C.) 141, 21 Am. Dec. 530; Yancy v. Field, 85 Va. 756, 761, 8 S. E. 721; Thomas's Admr. v. Lewis, 89 Va. 1, 37 Am. St. Rep. 848, 18 L. R. A. 170, 15 S. E. 389; Spooner v. Hilbush, 92 Va. 333, 341, 23 S. E. 751; Jackson v. Lamar, 67 Wash. 385, 121 Pac. 857; Newsome v. Allen, 86 Wash. 678, 151 Pac. 111.

In Johnson v. Colley, 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721, the court said: "We are not unmindful of the great danger of fraud in this sort of gift, and that the courts can not be too cautious in requiring clear proof of the

may be said that a fair preponderance of evidence is sufficient, but this may vary with the circumstances of the case. For instance, where the gift *mortis causa* which is sought to be established was from a father to a child, or to some relative who would under the laws of succession be the natural recipient of the donor's bounty at his death, less positive and unequivocal testimony would be necessary than would be required in a case where the alleged gift was to some person in nowise related to the donor and who had no claim upon him.⁴² In the first instance, there would not be the natural suggestion of fraud or undue influence which might arise in the latter case, and therefore slight evidence would suffice. All the circumstances surrounding the transaction are to be considered and if such circumstances are suspicious, the gift will not be sustained unless they are very clearly and fully explained. Thus, where the evidence showed that a party suffering from consumption had left for Texas and had with him three hundred dollars and a draft for one thousand dollars with which to pay his expenses, and who became so seriously ill at Kansas City

transaction. Nor are we prepared to dispute the wisdom of Lord Eldon's observance that 'It would be quite as well if this donation *mortis causa* were struck out of our law altogether.' So long, however, as the law remains unchanged, by competent authority, imbedded as it is in our jurisprudence, and sanctioned by the experience of centuries, the court must give it effect in cases like this, where the evidence is clear and convincing." The reference to Lord Eldon is from the case of

Duffield v. Elwes, 1 Bligh, N. S. 533, wherein he says: "Improvements in the law, or some other things which have been considered improvements, have lately been proposed; and if among those things called improvements this *donatio mortis causa* were struck out of the law altogether, it would be quite as well."

⁴² Love v. Francis, 63 Mich. 181, 6 Am. St. Rep. 290, 29 N. W. 843; approved in Caldwell v. Goode-nough, 170 Mich. 114, 135 N. W. 1057.

that he could not continue his journey, and died there, it was held that giving away the money and the draft when he was away from home and leaving himself nothing with which to pay his expenses, either to return or go on should he live, or with which to have his body returned to his home in case of his death, was a suspicious circumstance, and a gift under such conditions would be viewed with grave suspicion.⁴³

§ 208. Intention to Give Must Exist: Effect of Declarations.

There must exist the intention to give, otherwise there can be no valid donation either *mortis causa* or *inter vivos*. The mere declaration or expression of an intention or purpose to give personal property to another is not sufficient in itself to constitute a gift. Evidence of declarations or admissions of an alleged donor of an intention to give will not give rise to the presumption that there has been a gift,⁴⁴ but such evidence, however, is admissible in connection with all the facts of the case to prove the nature of certain acts or to corroborate other testimony.⁴⁵ And declarations which are in the nature

⁴³ In *Stewart v. Stokes*, 177 Mo. App. 390, 164 S. W. 156, the court says: "The rule is that, in circumstances here disclosed, a party claiming a deathbed gift of valuable property, and thus diverting it from its lawful descent and from the course of primary affection (in this case a wife and little boy), must have evidence so free of suspicion as will convince the judicial mind beyond any reasonable doubt that the gift was made as claimed. Ordinary preponderance or weight of evidence will not answer. So

easy would it be for those in the privacy of the death chamber to absorb the sick man's jewels, notes, stocks, bonds, and other property, if no protection was offered, that the law has put up every safeguard against such possibility."

⁴⁴ *Baber v. Caples*, 71 Ore. 212, Ann. Cas. 1916C 1025, 138 Pac. 472; *Cowdrey v. Barksdale*, 16 Ga. App. 387, 85 S. E. 617.

⁴⁵ *Campbell v. Sech*, 155 Mich. 634, 119 N. W. 922; *Lerche v. Kishpaugh*, 180 Mich. 617, 147 N. W.

of admissions against interest, although subsequent to the acts constituting the alleged gift, are admissible in evidence for the same purpose.⁴⁶

§ 209. Effect of the Donor's Declaration That the Gift Is to Be Effective If He Dies.

Delivery of personal property is often accompanied by language such as "In case I die," or "If anything should happen to me, the property is to belong to you." It has been held that a donor, by using such language, does not thereby impose a condition to the gift or make it testamentary. It is merely an expression by him of a condition which the law itself attaches to donations *mortis causa*, for they do not become absolute or irrevocable except upon the death of the donor. These are conditions imposed by law and need not be expressed by the donor; but if he does so while performing the other acts necessary to establish a donation *mortis causa*, it may be said that it but more clearly shows the nature of the gift.⁴⁷ However, a donor may, if he desires, im-

499; *Lewis v. Merritt*, 113 N. Y. 386, 21 N. E. 141; *Devlin v. Greenwich Savings Bank*, 125 N. Y. 756, 26 N. E. 744; *Blake v. Jones*, 1 Bailey Eq. (S. C.) 141, 21 Am. Dec. 530; *Jackson v. Lamar*, 67 Wash. 385, 121 Pac. 857.

In *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 11 L. R. A. 684, 26 N. E. 627, where the deceased had written a letter to the donee to the effect that he was afraid he was going to die under the operation he was about to undergo and that if he did not recover he gave certain personal property to the donee, but which

letter was never mailed and was found among the effects of the donor after his death, it was held that the letter was not sufficient to establish the gift but was strong evidence in confirmation and corroboration of oral testimony given, and the gift was sustained.

⁴⁶ *Darland v. Taylor*, 52 Iowa 503, 35 Am. Rep. 285, 3 N. W. 510; *Garrison v. Union Trust Co.*, 164 Mich. 345, 32 L. R. A. (N. S.) 219, 129 N. W. 691; *Keller v. McConville*, 175 Mich. 479, 141 N. W. 652; *Smith v. Maine*, 25 Barb. (N. Y.) 33.

⁴⁷ *Snellgrove v. Bailey*, 3 Atk.

pose conditions to gifts of personal property. A donor might have intended by the use of such language as is mentioned above, to have made his death an absolute condition to the passing of the property, not having intended to part with any estate therein unless death overtook him; or he might have used such language merely for the purpose of explaining the reason for making the gift. The meaning of such language, therefore, is a question of fact,⁴⁸ but when all the elements of a gift *mortis causa* are present, such language will ordinarily not be held to be testamentary, but merely explanatory.

§ 210. Declarations of Intention to Give, Without Delivery of Property, Are Testamentary in Character.

If a person who is ill, even with death approaching, attempts to dispose of his personal property, the *prima facie* presumption is that his acts or declarations, standing alone, were intended to be testamentary. This presumption prevails unless the contrary be clearly shown. A gift *mortis causa* can be sustained only when all the essential elements necessary to prove it have been clearly established. The mere intention to give is insufficient, for it must be accompanied by delivery, either actual or constructive. If the elements of a gift are lacking, there can not be a gift. Any declarations or admissions of an alleged donor, not being sufficient to prove a gift, would

214; Hill v. Chapman, 2 Bro. Ch. 612; Guinan's Appeal, 70 Conn. 342, 39 Atl. 482; Shackleford v. Brown, 89 Mo. 546, 1 S. W. 390; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313; Wells v. Tucker, 3 Bin. (Pa.) 366, 370; Thomas's Admr. v. Lewis, 89 Va. 1, 37 Am. St. Rep. 848, 18

L. R. A. 170, 15 S. E. 389; Johnson v. Colley, 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721. Compare: Newsome v. Allen, 86 Wash. 678, 151 Pac. 111.

⁴⁸ Fagan v. Troutman, 24 Colo. App. 473, 135 Pac. 122.

stand merely as declarations and, if expressing the intention of the owner of personal property that it should pass to another after his death, they would be testamentary in character and, unless executed formally in the manner required by the statutes regarding wills, would be ineffective to convey any interest in the property.⁴⁹

§ 211. The Same Subject: The Reason Given for the Rule.

The reason given in many decisions for holding that declarations of an alleged donor, unaccompanied by delivery, to the effect that some designated person is to have his property after his death, are testamentary in character, is that there has been no transfer of *ownership* or *title*. It was said in one case: "There must be a delivery of the property to the donee, or some one for him, at the time of the gift, and the *title*, though a defeasible one, must vest as of the time of the gift; otherwise the donor's declarations will be considered as testamentary only."⁵⁰ In another case it was said: "Inasmuch as there was no delivery of the notes in question to the appellant, the *ownership* of the notes remained in the deceased, and was in the deceased, at the time of his death."⁵¹

⁴⁹ In re Liphart, 227 Fed. 135; Basket v. Hassell, 107 U. S. 602, 27 L. Ed. 500, 2 Sup. Ct. 415; Lounsberry v. Boger, 193 Ill. App. 384; Miller v. Jeffress, 4 Gratt. (Va.) 472; Thomas's Admr. v. Lewis, 89 Va. 1, 37 Am. St. Rep. 848, 18 L. R. A. 170, 15 S. E. 389; Johnson v. Colley, 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721.

⁵⁰ In re Liphart, 227 Fed. 135, citing Thomas's Admr. v. Lewis,

89 Va. 1, 37 Am. St. Rep. 848, 18 L. R. A. 170, 15 S. E. 389.

In Johnson v. Colley, 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721, it was held that by "testamentary" is meant that no title is to vest in the donee until the death of the donor; therefore if a gift is in the nature of a testament, it must be executed in the manner prescribed for the execution of wills.

⁵¹ Lounsberry v. Boger, 193 Ill.

§ 212. The Same Subject: Criticism.

I have heretofore referred to the confusion in the language of decisions as to the time when a donation *mortis causa* takes effect.⁵² One of the elements necessary to constitute such a gift is delivery of the property by the donor, the *title* of the donee being merely inchoate until the donor's death, at which time it becomes absolute. It may therefore be said that a gift *mortis causa* is one not to take effect until the donor's death, but it becomes effective at such time as a gift, not as a testament. A more proper explanation to the author's mind would be, and it is in accord with the facts in the cases referred to, that the declarations and admissions of an alleged donor, unaccompanied by delivery, to the effect that certain personal property owned by him is to go to some designated person at his death, are insufficient to sustain a donation *mortis causa*, for the reason that an essential element of such a gift is lacking, namely, delivery.⁵³ Acts, declarations, or admissions expressing an intention to

App. 384. See, also, *Basket v. Hassell*, 107 U. S. 602, 27 L. Ed. 500, 2 Sup. Ct. 415.

⁵² See, ante, § 204.

⁵³ A deed of conveyance of personal property to a trustee in trust to collect the income and pay it to the settlor for life and at her death to pay an annuity to a niece and the balance to the trustee herself, the settlor reserving the right at any time during her life and at her discretion to revoke the trust in whole or in part, there having been a proper delivery, was held not to be testamentary. See *Windolph v. Girard*

Trust Co., 245 Pa. St. 349, 91 Atl. 634.

A trust of personal property may be declared orally. Therefore it is held, for instance, that if a decedent had, during his lifetime, deposited money with some bank with the declaration that the deposit was made in trust for some designated person and that at his death the depositary was to deliver it to the beneficiary named, the depositor having reserved the right to collect the interest during his lifetime, there having been a delivery, such a transaction is a completed gift

pass property at death are in their nature testamentary; they do not partake of that character merely because of an association with an alleged gift which fails for lack of delivery, since it would have to be said that, delivery and the other essential elements of a gift being present, the testamentary force of such acts, declarations or admissions is lost, for the transaction then takes effect as a gift and not as an attempted legacy or testamentary disposition. It may better be said that donations *mortis causa* take effect as such only when the conditions necessary to their validity are present, and as to declarations and admissions, although they are admissible in evidence as tending to show intent or to corroborate other testimony, yet standing alone they are insufficient to establish one of the principal essentials of such a gift, delivery, without which there can not be a donation *mortis causa*. This reasoning would stand true whether it is assumed that the title to the property which is the subject of a gift *mortis causa* passes with delivery, subject to be defeated in the event of certain contingencies, or whether the title does not pass absolutely until the death of the donor. As to testamentary declarations, standing by themselves, to be effective they must be expressed according to the formalities required for the execution of wills.

§ 213. A Trust Is Not Created by an Imperfect Gift: Enforcement of a Valid Gift.

An express trust of personal property need not be in writing. It may be created by actions or proper declarations on the part of the trustor, and such a trust, *inter vivos*, and such gifts are not invalid upon the ground that they are testamentary dispositions.

See *Boyle v. Dinsdale*, 45 Utah 112, 143 Pac. 136.

although voluntary when fully completed, will be enforced in equity. The trustor himself may act as trustee, the intervention of a third person being unnecessary. But in order that a valid trust may exist, the maker must declare the specific purposes of the trust and that the property, or some interest therein, is granted for such purposes; and the subject matter and the beneficiary of the trust must be definite. Imperfect or unexecuted gifts of personal property, therefore, can not create a trust. Courts of equity will not compel a person to complete a gift of personal property which he has declared an intention of making but did not perfect, and likewise courts of equity will refuse to compel the personal representatives of a deceased to complete an alleged donation *mortis causa*.⁵⁴ Where, however, the subject of a donation *mortis causa* was a chose in action, such as a promissory note of some person other than the donor, which was delivered unendorsed to the donee, the executor of the donor's estate may be compelled to allow the use of his name in a suit for the collection of the debt. This matter was dealt with at length in an early case, in an opinion rendered by Lord Eldon.⁵⁵ In a New York case, Judge Gridley, commenting upon Lord Eldon's opinion, says:

54 Northrip v. Burge, 255 Mo. 641, 164 S. W. 584; Clay v. Layton, 134 Mich. 317, 96 N. W. 458; O'Gorman v. Jolley, 34 S. D. 26, 147 N. W. 78.

"Nor will the court enforce as a trust a transaction which was intended as a gift, but is imperfect for that purpose." See Norway Savings Bank v. Merriam, 88 Me. 146, 33 Atl. 840.

And "an intention to give, evi-

denced by a writing, . . . may fail because no delivery is proved." In such a case the court will not allow it to take effect as a declaration of trust. See O'Gorman v. Jolley, 34 S. D. 26, 147 N. W. 78, quoting and citing Wadd v. Hazelton, 137 N. Y. 215, 33 Am. St. Rep. 707, 21 L. R. A. 693, 33 N. E. 143.

55 Duffield v. Elwes, 1 Bligh, N. S. 497.

“The principle established in this case is, that in the case of a gift of a bond, or mortgage, there is a trust raised which a court of equity will enforce, by compelling the executors to allow the use of their names in legal proceedings necessary to enforce the security against the debtor, for the purpose of carrying out the intention of the donor. In this respect there is a manifest distinction between a gift *inter vivos* and a donation *mortis causa*. In the former case a court of equity will not compel the donor to complete his gift, nor an executor to complete the gift of his testator; whereas, as we have seen, in the latter case, the donor may successfully invoke a court of chancery for that purpose.”⁵⁶ This, however, refers only to enforcing a completed gift *mortis causa*, not one which must fail because some essential element is lacking.

§ 214. Trusts or Conditions Attached to Donations Mortis Causa.

A donor may attach conditions to a gift *mortis causa* which will not affect its validity, such as, “Take this, Jim; when I am gone draw the money, put a monument over my brother Stillman’s grave, pay my funeral expenses, and the rest is yours.” This language accompanied a gift of two hundred dollars and was held not to affect its validity as a donation *mortis causa*.⁵⁷ The same ruling was had in another case where this language was used: “Now keep this, and if anything happens to

⁵⁶ Harris v. Clark, 2 Barb. (N. Y.) 94, 98, 99. See, also, Halliwell Savings Inst. v. Titcomb, 96 Me. 62, 69, 51 Atl. 249; Davis v. Ney, 125 Mass. 590, 28 Am. Rep. 272.

In Bates v. Kempton, 7 Gray (Mass.) 382, it was held that an

action on a note could be brought by the administrator of the donor’s estate, since the donor held title to it until his death, and therefore died entitled to do so.

⁵⁷ Larrabee v. Hascall, 88 Me. 511, 51 Am. St. Rep. 440, 34 Atl. 408. See, also, Hills v. Hills, 8

me, bury me decently, and put a headstone over me, and anything that is left is yours.'"⁵⁸ In such a case the gift is valid, but is coupled with a trust or condition which the donee must fulfill.

§ 215. Delivery and Continued Absence of Control Are Essential.

Delivery of the personal property which was the subject matter of a donation *mortis causa* was not required under the civil law, but the rule today is not only that delivery is necessary, but the possession of the property must not return to the donor. Delivery may be either actual or constructive, but it must be as complete a delivery as is possible according to the character of the property, and all control and dominion of the subject matter of the gift must pass from the donor.⁵⁹ As to delivery, there is no difference between gifts *mortis causa* and gifts *inter vivos*, delivery in both cases being absolutely essential.⁶⁰

Mees. & Wels. 401; Clough v. Clough, 117 Mass. 83; Dresser v. Dresser, 46 Me. 48.

⁵⁸ Curtis v. Portland Savings Bank, 77 Me. 151, 52 Am. Rep. 750.

⁵⁹ Bunn v. Markham, 7 Taunt. 224; Reddell v. Dobree, 10 Sim. 244; Miller v. Miller, 3 P. Wms. 356; Appeal of Colburn, 74 Conn. 463, 92 Am. St. Rep. 231, 51 Atl. 139; Cowdrey v. Barksdale, 16 Ga. App. 387, 85 S. E. 617; In re Elliott's Estate, 159 Iowa 107, 140 N. W. 200; Hatch v. Atkinson, 56 Me. 324, 96 Am. Dec. 464; Pennington v. Gittings, 2 Gill & J. (Md.) 208; Casserly v. Casserly,

123 Mich. 44, 81 N. W. 930; Lerche v. Kishpaugh, 180 Mich. 617, 147 N. W. 499; Crouse v. Judson, 41 Misc. Rep. 338, 84 N. Y. Supp. 755; Gardner v. Gardner, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340; Irish v. Nutting, 47 Barb. (N. Y.) 370; Clapper v. Frederick, 199 Pa. 609, 49 Atl. 218; O'Gorman v. Jolley, 34 S. D. 26, 147 N. W. 78; Spooner's Admr. v. Hilbish's Exr., 92 Va. 333, 23 S. E. 751; Phinney v. State, 36 Wash. 236, 68 L. R. A. 119, 78 Pac. 927; Dickeschied v. Exchange Bank, 28 W. Va. 340.

⁶⁰ Noble v. Smith, 2 Johns. (N. Y.) 52, 56, 3 Am. Dec. 399;

§ 216. Delivery to a Third Person for the Benefit of the Donee.

It is not necessary that delivery be made direct to the donee. If the donor clearly expresses his intention to make the gift to a designated person and, to carry out such intention, delivers the personal property to some third person for the benefit of the intended donee, he not being present at the time to receive the gift, the donor has made as complete a delivery as is possible under the circumstances and, unless proof to the contrary is shown, it will be presumed that the person receiving the property took the same as a trustee for the donee and not as the agent of the donor. Delivery to the donee being good, there is no reason why delivery to a third person for the benefit of the donee should not likewise be valid; there must, of course, be acceptance by the donee.⁶¹ And so, too, the depositing in the United States mail of an envelope, duly addressed to the donee, containing a letter, and a chose in action intended as a donation *mortis causa*, is a sufficient delivery to the agent of the donee, it having passed out of the control of the donor.⁶²

Harris v. Clark, 3 N. Y. 93, 51 Am. Dec. 352; Murdock v. McDowell, 1 Nott & McC. (S. C.) 237, 239, 9 Am. Dec. 684.

It is delivery which converts an unexecuted and revocable purpose into an executed and complete gift. See Hart v. Ketchum, 121 Cal. 426, 53 Pac. 931; Cutting v. Gilman, 41 N. H. 147; Emery v. Clough, 63 N. H. 552, 56 Am. Rep. 543, 4 Atl. 796; Walsh's Appeal, 122 Pa. St. 177, 9 Am. St. Rep. 83, 1 L. R. A. 535, 15 Atl. 470; Miller v. Jeffress, 4 Gratt. (Va.) 472;

Yancy v. Field, 85 Va. 756, 8 S. E. 721.

⁶¹ Drury v. Smith, 1 P. Wms. 404; Devoil v. Dye, 123 Ind. 321, 7 L. R. A. 439, 24 N. E. 246; Sessions v. Moseley, 4 Cush. (Mass.) 87; Shackelford v. Brown, 89 Mo. 546, 1 S. W. 390; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313; Williams v. Guile, 117 N. Y. 343, 349, 6 L. R. A. 366, 22 N. E. 1071; Wells v. Tucker, 3 Bin. (Pa.) 366; Johnson v. Colley, 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721.

⁶² United States v. Nutt, 6 Am.

But delivery to a third person as the agent of the donor is not sufficient, since the giver has not parted with the control of the property.⁶³

§ 217. Delivery Where the Property Is in the Possession of the Donee.

Where the personal property which is sought to be made the subject of a donation *mortis causa* is in the possession of the donee, such a gift may be sustained where the evidence is very clear and convincing that the donor intended, and declared his intention, to make the gift, and the donee accepted the same and retained the exclusive possession of the property. In such a case actual delivery is lacking, but the donor makes as complete a delivery as is possible under the circumstances.⁶⁴

§ 218. Cancellation of a Debt.

A debt, evidenced by some writing or secured by a deposit of some character, may be the subject of a donation *mortis causa* between the creditor and the debtor by the creditor surrendering to the debtor evidence of the indebtedness or the security, with a declaration of intention to that effect.⁶⁵

Law Rec. 302, Fed. Cas. No. 15904; Commonwealth v. Wood, 142 Mass. 459, 8 N. E. 432; Kennedy v. Dr. David Kennedy Corp., 66 N. Y. Supp. 225, 32 Misc. Rep. 480; Bainbridge v. Hoes, 149 N. Y. Supp. 20, 163 App. Div. 870.

⁶³ Farquharson v. Cave, 2 Coll. 356.

⁶⁴ Davis v. Kuck, 93 Minn. 262,

101 N. W. 165, distinguishing Allen v. Allen, 75 Minn. 116, 74 Am. St. Rep. 442, 77 N. W. 567.

But see contra: Drew v. Haggerty, 81 Me. 231, 10 Am. St. Rep. 255, 3 L. R. A. 230, 17 Atl. 63.

⁶⁵ Moore v. Darton, 7 Eng. L. & Eq. 134; Meredith v. Watson, 23 Eng. L. & Eq. 250.

§ 219. Constructive or Symbolic Delivery.

Constructive delivery of the personal property which is the subject of a gift *mortis causa*, is sufficient when such property by reason of its character or situation can not be actually delivered.⁶⁶ Thus, where moneys or securities are in a safe deposit box and not attainable at the time, the transfer of the key by the donor to the donee is a symbolic delivery and sufficient; this, even though a second key is in the possession of the bank and its use is necessary in order to secure possession of the contents of the box. By delivery of the key the donor parts with the means of access to the property.⁶⁷ Delivery of a key is sufficient to pass to the donee the contents of a trunk or box not within the presence of the donor, actual delivery at such time being impossible.⁶⁸ But if the box containing the subject matter of the gift *mortis causa* is accessible at the time to the donor, such as being kept in a secretary in the room wherein he is confined, the mere handing of the key to another without words of gift would make the receiver simply a custodian of the key and, where the subject matter of the gift is capable of being delivered, the delivery of a key to the box or receptacle wherein it is contained is insufficient.⁶⁹

⁶⁶ *Cowdrey v. Barksdale*, 16 Ga. App. 387, 85 S. E. 617.

⁶⁷ *Harrison v. Foley*, 206 Fed. 57, 124 C. C. A. 191. See, also, *Debinson v. Emmons*, 158 Mass. 592, 33 N. E. 706; *Marsh v. Fuller*, 18 N. H. 360; *Jones v. Brown*, 34 N. H. 439; *Thomas's Admr. v. Lewis*, 89 Va. 1, 37 Am. St. Rep. 848, 18 L. R. A. 170, 15 S. E. 389.

⁶⁸ *Cooper v. Burr*, 45 Barb. (N. Y.) 9; *Phipard v. Phipard*, 55

Hun (N. Y.) 433, 8 N. Y. Supp. 728; *Pink v. Church*, 60 Hun (N. Y.) 580, 14 N. Y. Supp. 337.

⁶⁹ *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267; *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464; *Keepers v. Fidelity, Title & Deposit Co.*, 56 N. J. L. 302, 44 Am. St. Rep. 397, 23 L. R. A. 184, 28 Atl. 585; *Gano v. Fisk*, 43 Ohio St. 462, 54 Am. Rep. 819, 3 N. E. 532.

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§ 220. A Writing, Without Delivery of the Property, Will Not Sustain a Donation Mortis Causa.

The mere declaration by an alleged donor of his desire or intention to make a donation *mortis causa*, if unaccompanied by delivery, will not sustain such a gift; and this is true whether the declaration be oral or in writing. The delivery of the property, either actual or constructive, is essential. Thus, the delivery of a bill of sale of household furniture, wearing apparel, and all other personal property owned or held by the grantor in a certain house, possession not passing to the alleged donee, has been held not to sustain a gift *mortis causa*.⁷⁰ A written instrument may be an aid in corroborating other testimony introduced to establish the gift; it may help to designate the property and to show the intention of the donor; but standing alone it does not establish a donation *mortis causa* any more than would oral declarations of the same character. Such gifts are effected only by, and take effect from, the delivery, either actual or constructive.⁷¹ The same rule applies to certificates of stock, bonds, and the like, which have been endorsed in favor of some designated person but not delivered; the most that can be said of such an endorsement is that it shows that

to a hospital, inspected the contents of her safe deposit box in company with her sister, to whom she delivered the key to the box, at the same time instructing the manager that if she didn't come back, the contents of the box were to be delivered to the sister, the contents not being too unwieldy to have been actually delivered, it was held that the facts did not sustain a donation *mortis causa*.

See *Newsome v. Allen*, 86 Wash. 678, 151 Pac. 111.

⁷⁰ *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267.

Compare: *Ward v. Turner*, 2 Ves. Sen. 431, 440; *Johnson v. Smith*, 1 Ves. Sen. 314; *Tate v. Hilbert*, 2 Ves. Jun. 120. But see *Ridgen v. Vallier*, 2 Ves. Sen. 258.

As to testamentary declarations, see, *ante*, § 210.

⁷¹ *McGrath v. Reynolds*, 116 Mass. 566.

the owner of the property intended to make a gift but which, being voluntary and without consideration and incomplete, was not binding.⁷²

§ 221. Choses in Action as the Subject of a Donation Mortis Causa: Changes in the Rule.

The rule as to the personal property which might be disposed of by a donation *mortis causa* has undergone many changes. Originally only chattels which could be actually delivered by hand could be the subject of such a

72 In *Bragg v. Martenstein*, 25 Cal. App. 199, 143 Pac. 79, where the evidence showed that the decedent had placed certain stocks and bonds duly endorsed in four separate envelopes and upon each had written the name of one of her sisters with the statement that the enclosure was the property of such sister, had then enclosed each of these envelopes in another envelope, had made a will disposing of the remainder of her property but omitting all reference to the stocks and bonds, and which envelopes had been left in an open desk in her room to which her father had access and from which some four days before her death her father had taken the envelopes and delivered them to the sisters of decedent without mentioning the fact to her because of her ill health, although these envelopes were enclosed in the paper on which was endorsed "In case of my death to be opened only by R. B., Sr., or R. B. M.," it being signed and dated by the decedent,

it was held that a gift *mortis causa* was not established; that the wrapping on the outside of the envelopes had reference only to the persons who should open the package in the event that they were not delivered prior to the death of the donor, and that such writing had no reference to delivery.

In *Fauley v. McLaughlin*, 80 Wash. 547, 141 Pac. 1037, it was held that a letter written by one just prior to an operation, not mailed, but found among the valuable effects of the writer after his death about a year and a half later, showed only an intention to give at the date the letter was written, but there having been no delivery of the letter or the property, a donation *mortis causa* could not be sustained.

In *O'Gorman v. Jolley*, 34 S. D. 26, 147 N. W. 78, a certificate of deposit had the following writing pasted on the back: "This certificate and the interest thereon is my property during the remainder

gift; then the rule was extended to include securities such as bank-notes, notes payable to bearer or order and duly endorsed; later it included choses in action evidenced by a writing where the interest which it represented was transferred; and subsequently was extended to non-negotiable notes or negotiable notes not endorsed, but which were delivered.⁷³ The decisions are not en-

of my life. In the event of my death, I hereby authorize and instruct the bank to pay and distribute the amount of said certificate of deposit as follows:" Then followed the names of some fifteen persons to whom payments were to be made, with the following: "I direct that the certificate be handed Father Flood, immediately after my death, and the above conditions be fulfilled." The writing was signed by the decedent. The certificate, with the writing attached, was taken by Father Flood, but was returned to the deceased at her request a few days later, she retaining it until her death. The court said in effect that the execution of the writing on the back of the certificate was of no more force than if the amount of money mentioned had been enclosed in an envelope and the same writing had been endorsed thereon; that control of the property having returned to the donor, the most that could be said of the transaction was that it was an agreement to make a gift which, being without a consideration, is not binding.

In *Gray v. Doubikin*, 188 Mo.

App. 667, 176 S. W. 514, where a father, just prior to an operation, assigned certain certificates of stock to his son, at the same time declaring that if he did not survive he wished the stock to be divided among his children, there having been no delivery, it was held that the facts did not sustain a gift *mortis causa*. See, also, *Edwards v. Jones*, 1 Mylne & Cra. 226; *Stokes v. Sprague*, 110 Iowa 89, 81 N. W. 195; *Lounsberry v. Boger*, 193 Ill. App. 384; *Godard v. Conrad*, 125 Mo. App. 165, 101 S. W. 1108; *Foley v. Harrison*, 233 Mo. 460, 136 S. W. 354.

But see *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313, where an assignment in writing, made by a donor who gave it to his wife to deliver it to his granddaughter, although not accompanied by a delivery of the certificates of stock so assigned, was held sufficient to transfer all interest out of the donor, that the donee became the equitable owner of the stock, and that the representatives of the donor became, by operation of law, trustees for the donee.

⁷³ *Ward v. Turner*, 2 Ves. Sen. 431; *Jones v. Selby*, *Preced. Ch.*

tirely harmonious, but the general rule in England and in the United States is that if one delivers property to another so that there has been a transfer to the receiver of the legal or equitable title to the property or the fund which it represents, the other essential elements of the gift being present, it is sufficient. Thus, non-negotiable notes, bonds, mortgages, certificates of stock, and the like, have been held proper subjects for donations *mortis causa*.⁷⁴

§ 222. The Same Subject: Where Endorsement Precludes Payment Until After the Donor's Death.

In order that a chose in action may be the subject of a completed donation *mortis causa*, it must represent some subsisting obligation and must be delivered to the donee so as to vest him with an equitable title to the fund which the writing represents; and at the same time all control or dominion over it, on the part of the donor, must cease. Any delivery which does not give the donee the right of

300; *Miller v. Miller*, 3 P. Wms. 356; *Hill v. Chapman*, 2 Bro. C. C. 612; *Hurst v. Beach*, 5 Madd. 351; *Duffield v. Elwes*, 1 Bligh, N. S. 497; *In re Mead*, L. R. 15 Ch. Div. 651; *Moore v. Moore*, L. R. 18 Eq. 474; *Camp's Appeal*, 36 Conn. 88, 4 Am. Rep. 39; *Sessions v. Moseley*, 4 Cush. (Mass.) 87; *Bates v. Kempton*, 7 Gray (Mass.) 382; *Parish v. Stone*, 14 Pick. (Mass.) 198, 25 Am. Dec. 378; *Chase v. Redding*, 13 Gray (Mass.) 418; *Kingman v. Perkins*, 105 Mass. 111; *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 37 Am. Rep. 371; *Caldwell v. Goodenough*, 170 Mich. 114, 135 N. W. 1057;

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Pfeifer v. Badenhop, 86 N. J. L. 492, 92 Atl. 273; *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 11 L. R. A. 684, 26 N. E. 627; *Tillinghast v. Wheaton*, 8 R. I. 536, 5 Am. Rep. 621, 94 Am. Dec. 126.

A certificate of stock in a Georgia company, stating that the owner was entitled to so many shares, or acres of land, granted to the company, was held a mere chose in action and therefore it could be the subject of a gift.—*Blake v. Jones*, 1 Bailey Eq. (S. C.) 141, 21 Am. Dec. 530.

⁷⁴ *Johnson v. Spies*, 5 Hun (N. Y.) 468; *Walsh v. Sexton*, 55 Barb. (N. Y.) 251; *Westerlo v.*

reducing the fund to possession is not sufficient. Where the donee can obtain possession of the property represented by a writing only after the donor's death, as, for instance, where the endorsement on the instrument is to that effect, the transaction is testamentary in character and is not good as a donation *mortis causa*.⁷⁵ In a leading case the following facts were in evidence: A decedent, in apprehension of death, wrote as follows on the back of a certificate of deposit: "Pay to Martin Basket of Henderson, Kentucky; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I shall attend to it myself." The certificate in question was payable on demand and was delivered to the alleged donee. The court said that if the certificate had been endorsed in blank, or there had been no special endorsement to the donee, or if it had been without any endorsement, and had been delivered to the donee, it would have transferred the title of the donor to the fund represented by the certificate and would have enabled the donee to have reduced the fund into actual possession. If the donee had obtained possession of the fund and the donor had thereafter revoked the gift, the donee would have simply returned the money instead of the certificate. But where the delivery of a certificate of deposit is accompanied by an endorsement which qualifies or limits the authority of the donee to collect the money, as in this case where it could not be collected until after the death

DeWitt, 36 N. Y. 340, 93 Am. Dec. 517; Champney v. Blanchard, 39 N. Y. 111.

⁷⁵ Powell v. Hellicar, 26 Beav. 261; Reddel v. Dobree, 10 Sim. 244; Bunn v. Markham, 7 Taunt. 224; Hatch v. Atkinson, 56 Me.

324, 96 Am. Dec. 464; Wing v. Merchant, 57 Me. 383; Coleman v. Parker, 114 Mass. 30; McWillie v. Van Vacter, 35 Miss. 428, 72 Am. Dec. 127; Egerton's Exrs. v. Egerton, 17 N. J. Eq. 419.

of the donor, no interest in the fund can pass with delivery; by the terms of such an endorsement the title remains in the donor until his death and the donee can not obtain possession until that time. Delivery of the possession of the fund is therefore impossible under such circumstances. Such an endorsement on the certificate is merely a check upon the bank against a fund in which the donee, by the terms of the endorsement, can acquire no interest until after the donor's death.⁷⁶ As was said in another case, "The transfer of the ownership of property, to take effect at the death of the donor, is, in effect, a testamentary disposition of such property, and to make such disposition valid, the statutory requirements concerning the execution of wills must be observed and carried out."⁷⁷

§ 223. Deposits in Savings Banks: Delivery of Pass Book.

Deposits in savings banks are very commonly transferred as donations *mortis causa*, the weight of authority

⁷⁶ *Basket v. Hassell*, 107 U. S. 602, 27 L. Ed. 500, 2 Sup. Ct. 415.

In *Mitchell v. Smith*, 4 De G. J. & S. 422, where the following endorsement was put on some promissory notes: "I bequeath . . . pay the within contents to Simon Smith, or his order, at my death," Lord Justice Turner said: "In order to render the endorsement and delivery of a promissory note effectual they must be such as to enable the endorsee himself to endorse and negotiate the note. That the respondent, Simon Smith, could not have done during the testator's life." It was accordingly held that the disposition of the notes was testamentary and invalid.

In *Lounsberry v. Boger*, 193 Ill. App. 384, the following endorsement on five promissory notes which were never delivered, although the deceased had told the makers of the notes, after his death to be sure to look at the endorsement on the notes and to pay them to the party there mentioned, the endorsement reading: "If this note is not paid until my death, pay to the order of S. L.," and which endorsement had been duly signed by the deceased, was held insufficient to constitute a gift *mortis causa*. See, also, *Stokes v. Sprague*, 110 Iowa 89, 81 N. W. 195; *O'Gorman v. Jolley*, 34 S. D. 26, 147 N. W. 78.

⁷⁷ *Lounsberry v. Boger*, 193 Ill. App. 384.

being that the gift of such a deposit by delivery of the pass book is a valid and complete gift of the fund which it represents. Savings banks accounts are peculiar in their nature since a pass book is issued to a depositor and stands as the security and evidence of the indebtedness of the bank to him. This pass book must be presented to the bank when money is deposited or withdrawn, all deposits and withdrawals are entered therein and the pass book serves the same purpose as a certificate of deposit; therefore in itself it stands as some evidence of title. The delivery of the pass book is essential and it must be accompanied by the declaration of the donor of his intention to make a present gift rather than a testamentary disposition, but no order or assignment is necessary.⁷⁸ A mere order for the payment to the donee of a savings bank deposit unaccompanied by a delivery

78 *Basket v. Hassell*, 107 U. S. 602, 27 L. Ed. 500, 2 Sup. Ct. 415; *Camp's Appeal*, 36 Conn. 88, 4 Am. Rep. 39; *In re Guinan's Appeal*, 70 Conn. 342, 39 Atl. 482; *Fagan v. Troutman*, 24 Colo. App. 473, 135 Pac. 122; *Whalen v. Milholland*, 89 Md. 199, 207, 44 L. R. A. 208, 43 Atl. 45; *Brewer v. Bowersox*, 92 Md. 567, 571, 48 Atl. 1060; *Frentz v. Schwarze*, 122 Md. 12, 89 Atl. 439; *Parish v. Stone*, 14 Pick. (Mass.) 198, 25 Am. Dec. 378; *Grover v. Grover*, 24 Pick. (Mass.) 261, 35 Am. Dec. 319; *Reed v. Whipple*, 140 Mich. 7, 103 N. W. 548; *State Bank of Crosswell v. Johnson*, 151 Mich. 538, 115 N. W. 464; *Union Trust and Sav. Bank v. Tyler*, 161 Mich. 561, 137 Am. St. Rep. 523, 126 N. W. 713;

Caldwell v. Goodenough, 170 Mich. 114, 135 N. W. 1057; *Kimball v. Leland*, 110 Mass. 325; *Loucks v. Johnson*, 70 Hun 565, 24 N. Y. Supp. 267; *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 11 L. R. A. 684, 26 N. E. 627; *Polley v. Hicks*, 58 Ohio St. 218, 41 L. R. A. 858, 50 N. E. 809; *Crook v. First Nat. Bank*, 83 Wis. 31, 35 Am. St. Rep. 17, 52 N. W. 1131.

See, contra: *Pace v. Pace*, 107 Miss. 292, 65 So. 273.

Compare the reasoning of the following cases, wherein an order for the deposit accompanied the delivery of the bank book: *Larabee v. Hascall*, 88 Me. 511, 51 Am. St. Rep. 440, 34 Atl. 408, where the order was for only a portion

of the pass book has been held insufficient to establish a gift since the depositor or any other person with an order for the payment of the money, could have drawn the account from the bank upon presentation of the bank book irrespective of the fact of the outstanding order.⁷⁹ But where there has been delivery of the pass book of a savings bank account, a by-law of the bank requiring an order or a power of attorney from the depositor in order

of the deposit; *Foley v. New York Sav. Bank*, 142 N. Y. Supp. 822, 157 App. Div. 868, where the order was for the full amount of the deposit.

In some cases the courts have attempted to distinguish between an assignment of a full account and an assignment of a portion only, holding that in the first instance it was more the transfer of a specific fund, while in the latter case it was merely an order to collect money.

On the same subject, see, also, *Harris v. Clark*, 3 N. Y. 93, 114 et seq., 51 Am. Dec. 351.

⁷⁹ *Conser v. Snowden*, 54 Md. 175, 39 Am. Rep. 368.

In *Pfeifer v. Badenhop*, 86 N. J. L. 492, 92 Atl. 273, the evidence showed that a party asked for his savings bank book and upon learning that it was in a safe at his brother's house, executed a printed form of draft furnished by the bank. This draft had printed at the top thereof the words: "No payments made without deposit book." The executed draft directed the bank to pay to "my father

and mother (or bearer) all my money (Dollars or Pass Book No.) 172959," the parts in brackets being in print. The bank book not having been delivered, the gift failed.

As to an order for only a part of a debt or fund constituting an equitable assignment of the amount, see: *Basket v. Hassell*, 107 U. S. 602, 27 L. Ed. 500, 2 Sup. Ct. 415; *National Exchange Bank v. McLoon*, 73 Me. 498, 40 Am. Rep. 388; *Roberts v. Noyes*, 76 Me. 590; *Horne v. Stevens*, 79 Me. 262, 9 Atl. 616; *Dana v. Third Nat'l Bank*, 13 Allen (Mass.) 445, 90 Am. Dec. 316; *James v. Newton*, 142 Mass. 366, 56 Am. Rep. 692, 8 N. E. 122; *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515.

As to an order for the full amount of a deposit, with the delivery of the bank book, being a valid transfer of the funds represented thereby without further notice or even an acceptance of the order by the bank, see: *Kimball v. Leland*, 110 Mass. 325; *Foss v. Lowell Five Cents Savings Bank*, 111 Mass. 285.

that a third person may draw out any of the money standing in the account will not defeat the gift. The owner of the account may draw it from the bank by presenting the pass book; if the account is sold by the depositor to another, the bank could not require the owner to produce a power of attorney, but could require him to produce satisfactory proof of the ownership of the book and the account. The same rule would apply as in the case of a gift of a non-negotiable chose in action, a certificate of deposit or an unendorsed note.⁸⁰ But proof of all the essential elements of a donation *mortis causa*, such as apprehension of death, and the gift in contemplation thereof, delivery, and the death of the donor without having revoked the gift, also proper proof by the donee of his right to the account and ownership thereof, are necessary,⁸¹ and such proof must be clear, strong and satisfactory.⁸²

§ 224. Promissory Notes as the Subject of the Gift.

There is an apparent conflict of opinion as to whether a promissory note or a check on a commercial bank may be the subject of a donation *mortis causa*. It was formerly held that a promissory note payable to the order of some designated person could not be the subject of a gift *mortis causa* by the mere delivering of the same without an endorsement;⁸³ although it was otherwise if

⁸⁰ Ridden v. Thrall, 125 N. Y. 572, 21 Am. St. Rep. 758, 11 L. R. A. 684, 26 N. E. 627.

⁸¹ Danzinger v. Seamen's Bank for Savings, 149 N. Y. Supp. 207, 86 Misc. Rep. 316.

⁸² Matter of Swade, 65 App. Div. 592, 72 N. Y. Supp. 1030; Lahr v.

Jones, 74 App. Div. 54, 77 N. Y. Supp. 213; Devlin v. Greenwich Sav. Bank, 125 N. Y. 756, 26 N. E. 744.

⁸³ Miller v. Miller, 3 P. Wms. 356; Bradley v. Hunt, 5 Gill & J. (Md.) 54, 23 Am. Dec. 597.

the note was made payable to bearer.⁸⁴ This rule, however, is contrary to the weight of modern authority and the general rule now is that a promissory note, whether payable to bearer or not, and though unendorsed, may pass by delivery and is the proper subject of a donation *mortis causa*.⁸⁵ This has reference, however, to a promissory note executed by some person other than the donor, for if the donor, voluntarily and without consideration, should execute a promissory note in favor of a donee and deliver the same, it would amount to no more than the expression of an intention to make a gift and would be unenforceable.⁸⁶ Of course, should the note before maturity pass into the hands of some innocent third person for value, payment of the note might be enforced.

§ 225. Checks and Drafts: Not Subjects of Gifts Mortis Causa.

The rule as to checks and drafts is similar to that of promissory notes of which the donor is the maker. In an early English case a bill for one hundred pounds drawn upon a goldsmith by a person on his deathbed, in favor of his wife and delivered to her and which stated that it was to buy her mourning and maintain herself until her jointure became due, was held good as a gift

⁸⁴ Parish v. Stone, 14 Pick. (Mass.) 203, 25 Am. Dec. 378.

⁸⁵ Borneman v. Lidlinger, 15 Me. 429, 33 Am. Dec. 626; Bates v. Kempton, 7 Gray (Mass.) 382; Pierce v. Boston Five Cents Sav. Bank, 129 Mass. 425, 37 Am. Rep. 371; Blazo v. Cochrane, 71 N. H. 585, 53 Atl. 1026; Varrick v. Hitt, 66 N. J. Eq. 442, 57 Atl. 406; Baker v. Moran, 67 Ore. 386, 136 Pac. 30; Baber v. Caples, 71 Ore. 212, Ann. Cas. 1916C, 1025, 138

Pac. 472; Phinney v. State, 36 Wash. 236, 68 L. R. A. 119, 78 Pac. 927.

⁸⁶ Raymond v. Sellick, 10 Conn. 480, 485; Parish v. Stone, 14 Pick. (Mass.) 198, 25 Am. Dec. 378; Copp v. Sawyer, 6 N. H. 386; Harris v. Clark, 3 N. Y. 93, 51 Am. Dec. 352; overruling Wright v. Wright, 1 Cow. (N. Y.) 598; Holley v. Adams, 16 Vt. 206, 42 Am. Dec. 508.

mortis causa.⁸⁷ This decision has often been questioned. Distinctions have been made between the instruments just mentioned. A promissory note executed by the donor and payable to a donee, or a draft drawn in favor of a donee upon some third party, has been distinguished from a check in that the latter is always drawn on a bank. A draft or bill of exchange generally calls for so much money out of a general fund; it is not an assignment of the fund or any part thereof and gives the payee no claim on the drawee unless the latter accepts it. If the draft is drawn on a special or particular fund, the case may be different if the draft is so worded that it is in effect an equitable assignment of the fund.⁸⁸ But, as we have before seen, a mere assignment standing alone is not sufficient to constitute a gift *mortis causa*, and a draft would be unenforceable until after its acceptance. As to checks, in the ordinary course of business they are treated as cash and might go into the hands of an innocent third person for value, in which event they could be enforced;⁸⁹ but if a check remains in the possession of the donee and is not presented to the bank and paid or certified prior to the death of the maker, the gift must fail. This has reference to checks drawn by the donor, not to checks payable to himself and drawn by third

⁸⁷ *Lawson v. Lawson*, 1 P. Wms. 441.

In the later case of *Tate v. Hilbert*, 2 Ves. Jun. 120, Lord Loughborough stated that the report of the above case was inaccurate, yet, however, he held that the decision was correct. See, also: *Gardner v. Parker*, 3 Madd. 184; *Phinney v. State*, 36 Wash. 236, 68 L. R. A. 119, 78 Pac. 927.

⁸⁸ *Harris v. Clark*, 3 N. Y. 93, 51 Am. Dec. 352; *Curry v. Powers*, 70 N. Y. 218, 26 Am. Rep. 577.

⁸⁹ *Rolls v. Pearce*, L. R. 5 Ch. Div. 730; *Hewitt v. Kaye*, L. R. 6 Eq. 198; *Bromley v. Brunton*, L. R. 6 Eq. 275; *Sheedy v. Roach*, 124 Mass. 472, 26 Am. Rep. 680; *Vandermark v. Vandermark*, 55 How. Pr. (N. Y.) 408; *Harris v. Clark*, 3 N. Y. 93, 51 Am. Dec. 352.

parties. The fact that it is drawn upon a bank does not seem material. The main point is that a check is merely an order for money and not an equitable assignment of the fund. The weight of authority is that the delivery of a draft or a check to an alleged donee who retains the same until after the maker's death, the draft not having been previously accepted by the drawee or the check not having been certified by the bank, is not sufficient to constitute a donation *mortis causa*.⁹⁰

§ 226. The Same Subject: Decisions to the Contrary.

It has been held, contrary to the weight of authority, that the delivery of a check by a maker, payable to a donee, which remained in the custody of the donee until after the maker's death, constituted a completed gift *mortis causa*. Thus, where the check was for a sum greater than the amount on deposit, it was held a valid

⁹⁰ *Amis v. Witt*, 33 Beav. 619; *Hewitt v. Kaye*, L. R. 6 Eq. 198; *In re Beak's Estate*, L. R. 13 Eq. 489; *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Jones v. Lock*, L. R. 1 Ch. App. 25; *In re Mead*, L. R. 15 Ch. Div. 651; *Basket v. Hassell*, 107 U. S. 602, 27 L. Ed. 500, 2 Sup. Ct. 415; *Florence Mining Co. v. Brown*, 124 U. S. 385, 31 L. Ed. 424, 8 Sup. Ct. 531; *Raymond v. Sellick*, 10 Conn. 480; *McKenzie v. Downing*, 25 Ga. 669; *Graves v. Safford*, 41 Ill. App. 659; *Blanchard v. Williamson*, 70 Ill. 647; *West v. Cavins*, 74 Ind. 265; *May v. Jones*, 87 Iowa 188, 54 N. W. 231; *Conser v. Snowden*, 54 Md. 175, 39 Am. Rep. 368; *Bullard v. Randall*, 1 Gray (Mass.) 605, 61

Am. Dec. 433; *Warren v. Durfree*, 126 Mass. 338; *Walter v. Ford*, 74 Mo. 195, 41 Am. Rep. 312; *Second National Bank v. Williams*, 13 Mich. 282; *Sanborn v. Sanborn*, 65 N. H. 172, 18 Atl. 233; *Fink v. Cox*, 18 Johns. (N. Y.) 145, 9 Am. Dec. 191; *Bainbridge v. Hoes*, 149 N. Y. Supp. 20, 163 App. Div. 870; *Curry v. Powers*, 70 N. Y. 212, 218, 26 Am. Rep. 577; *First Nat. Bank v. Clark*, 134 N. Y. 368, 17 L. R. A. 580, 32 N. E. 38; *Holmes v. Roper*, 141 N. Y. 64, 36 N. E. 180; *Hamor v. Moore*, 8 Ohio St. 239; *Estate of Helfenstein*, 77 Pa. St. 328, 18 Am. Rep. 449; *Brown v. Moore*, 3 Head. (Tenn.) 671; *Holley v. Adams*, 16 Vt. 206, 42 Am. Dec. 508.

gift for the amount on deposit and that the donee was entitled to bring an action against the executors of the estate of the deceased donor for the money which they had drawn out of the bank.⁹¹ Also, in a case where a check was for an amount less than the sum on deposit, but the expenses of administration had caused the estate to be decreased to an amount less than the face of the check, it was held that the check was good as a gift *mortis causa* for the amount over and above that needed for the expenses of administration; that the deceased had intended a gift and that his will should not be thwarted by any technical construction. The court laid down the principle that where there had been the delivery of a check, accompanied by the intention that a present interest in money which it represented be transferred to the donee and, there having been no revocation, the intention of the donor should be given effect, and that the holder had the right to have the check paid after the death of the maker as well as before, whether it was received as a gift or for a consideration.⁹²

⁹¹ Aubrey v. O'Byrne, 188 Ill. App. 601.

⁹² Phinney v. State, 36 Wash. 236, 68 L. R. A. 119, 78 Pac. 927.

Compare: Graves v. Safford, 41 Ill. App. 659.

CHAPTER XI.

PROPERTY WHICH MAY BE DEVISED OR BEQUEATHED.

- § 227. Power of testamentary disposition is statutory.
- § 228. Rules in England prior to the Norman Conquest.
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after-acquired realty shall pass.
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- § 235. Of what date is a will presumed to speak?
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only the subject matter disposed of, not the bene-
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- § 261. Benefits accruing from membership in mutual benefit societies.
- § 262. Claims against the government: When they may be bequeathed.
- § 263. Limitations upon devises for charitable purposes.
- § 264. No property right in a corpse: Right of burial.

§ 227. Power of Testamentary Disposition Is Statutory.

The power of disposing of property by will to take effect upon the death of the testator, is not a natural right, but a statutory one;¹ but where the right to devise or bequeath property is given, such right may be exer-

¹ Northern Trust Co. v. Buck & Rayner, 183 Ill. App. 170, affirmed in 263 Ill. 222, 104 N. E. 1114; Donaldson v. State, 182 Ind. 615, 101 N. E. 485; Porter v. Union Trust Co. of Indianapolis, 182 Ind. 637, 108 N. E. 117; Breadheft v. Cleveland, (Ind.) 110 N. E. 662.

cised in any manner not unlawful or in contravention of some statute. When a will has been legally executed, the court can not control matters which were within the discretion of the testator, or change the provisions of the will because it may deem that a different disposition would be more proper.²

§ 228. Rules in England Prior to the Norman Conquest.

In England, prior to the Norman Conquest, real property could, under certain restrictions, be devised by will;³ but after the introduction of the system of military tenure, the rights of the over-lord prevented either the free alienation of lands during life, or a testamentary disposition thereof.⁴ As to personal property, however, the right to bequeath it appears to have existed in England from the earliest times, subject to the rights of the wife and children to their *reasonable parts*.⁵ Under the fiction of creating a use to commence *in futuro*, however, dispositions were made of real property which were testamentary in effect,⁶ until such transfers were attempted to be prevented by the Statute of Uses.⁷ But five years later, A. D. 1540, the Statute of Wills (32 Henry VIII, ch. 1, explained by 34 Henry VIII, ch. 5) was enacted, under

² *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882; *In re Little*, 22 Utah 204, 61 Pac. 899.

In *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814, the court says: "If a will is legally executed, and violates no rule of law, all courts must respect the expressed designs of the testatrix, and must accept her action as based on such reason as satisfied her. The view which other persons may take of what they think she ought

to have done, can have no bearing on the construction of what she actually saw fit to do."

³ See, ante, § 7, as to the early rule in England.

⁴ See, ante, § 8, as to the effect of military tenure in England.

⁵ See, ante, § 9, as to the right to bequeath personal property.

⁶ See, ante, §§ 11, 12, 13.

⁷ See, ante, §§ 13, 14, as to the Statute of Uses, its purposes and effect.

which those owning lands in fee simple, with certain exceptions, could devise two-thirds of their lands held in military tenure and all their lands held in socage.⁸ Then, A. D. 1660, military tenures were abolished in England, and the right of testamentary disposition of property became general.

§ 229. Devises of After-acquired Real Property.

The early conception in England of a devise of real property was different from that of a bequest of personalty, the rule as to the latter having been adopted from the civil law. A bequest of personalty was considered as the appointment of an heir, whereas a devise of realty was considered in the nature of a conveyance by way of appointment, or as a conveyance declaring the uses to which the land should be subject.⁹ Devising land by will being a statutory conveyance unknown to the feudal or common law, it was first held that no man could devise real property which he did not own at the time the will was made. As to personalty, however, a testator could, by an appropriate provision in his will, bequeath all such property which he might be possessed of at the time of his death.¹⁰ Then, after the enactment of the Statute of Wills of 1 Vict., ch. 26 (A. D. 1837), any qualified person could devise or bequeath by a will executed according to the formalities required by the act, all real or personal property which he might be entitled to, either at law or in equity, at the time of his death, even though his title to or interest in the property was acquired subsequent to the execution of the will.

⁸ See, ante, §§ 15, 16.

⁹ *George v. Green*, 13 N. H. 521;

Battle v. Speight, 31 N. C. 288;

Watson v. Child, 9 Rich. Eq. (S. C.) 129.

¹⁰ See, ante, §§ 26, 27, 28, 29.

§ 230. The Same Subject: Early Rule in the United States.

The statutes regarding wills in force in the original colonies and those adopted after the independence of the United States, being long prior to the statute of 1 Vict., ch. 26 (A. D. 1837), were founded principally upon the Statute of Wills of 32 Henry VIII, ch. 1, as explained by 34 Henry VIII, ch. 5, and the acts which extended it. The rule, therefore, that a testator could not by his will devise real property which he subsequently acquired, as it originally prevailed in England, to an extent, at one time, prevailed in the United States,¹¹ but this has generally been changed by statute.¹²

§ 231. The Intention of the Testator Determines Whether or Not After-Acquired Realty Shall Pass.

A general residuary clause in a will whereby a testator devises and bequeaths all the remainder of his property, not otherwise disposed of, which he may possess at the time of his death, shows a clear intention to dispose of

¹¹ *Smith v. Edrington*, 8 Cranch (U. S.) 66, 3 L. Ed. 490; *Meador v. Sorsby*, 2 Ala. 712, 36 Am. Dec. 432; *Brewster v. McCall's Devisees*, 15 Conn. 274; *Frazier v. Boggs*, 37 Fla. 307, 20 So. 245; *Roberts' Heirs v. Elliott's Heirs*, 3 T. B. Mon. (19 Ky.) 395; *Skeene v. Fishback*, 1 A. K. Marsh. (8 Ky.) 356; *Bowman v. Violet*, 4 T. B. Mon. (20 Ky.) 350; *Beall v. Schley*, 2 Gill (Md.) 181, 198, 41 Am. Dec. 415; *Wait v. Belding*, 24 Pick. (Mass.) 129; *George v. Green*, 13 N. H. 521; *McKinnon v. Thompson*, 3 Johns. Ch. (N. Y.) 307; *Green v. Dikeman*, 18 Barb.

(N. Y.) 535, 537; *Parker v. Bogardus*, 5 N. Y. 309; *Foster v. Craige*, 37 N. C. 533; *Girard v. Philadelphia*, 4 Rawle (Pa.) 323, 26 Am. Dec. 145; *Raines v. Barker*, 13 Grat. (Va.) 128, 136, 67 Am. Dec. 762.

¹² *Frazier v. Boggs*, 37 Fla. 307, 20 So. 245; *Willis v. Watson*, 4 Scam. (5 Ill.) 64; *Peters v. Spillman*, 18 Ill. 370; *Williams v. Johnson*, 112 Ill. 61, 1 N. E. 274; *Roberts' Heirs v. Elliott's Heirs*, 3 T. B. Mon. (19 Ky.) 395; *Bowman v. Violet*, 4 T. B. Mon. (20 Ky.) 350; *Blaney v. Blaney*, 1 Cush. (55 Mass.) 107; *Loveren*

property which he might acquire subsequent to the execution of his will. A general devise or bequest of all real or personal property which might be owned by the testator at the time of his death would show a like intent. It is the intent of the testator which prevails,¹³ and this rule was applied in an American case arising prior to a statutory enactment authorizing the devising of after-acquired real property, where the will enacted that the intention of the testator was that lands acquired subsequent to the execution thereof should pass;¹⁴ but in England, under like circumstances, prior to the Statute of Wills (A. D. 1837), the contrary rule was laid down.¹⁵ The intention of the testator likewise governs where it is clearly expressed that his purpose was not to dispose of real property which he might thereafter acquire.¹⁶ And where he disposes of certain lands in a particular city or county, and afterwards acquires other lands in the same section, or elsewhere, it has been held that an inten-

v. Lamprey, 22 N. H. 434; *Turpin v. Turpin*, 1 Wash. (Va.) 75; *Harrison v. Allen*, 3 Call (Va.) 289.

¹³ *Langdale v. Briggs*, 3 Sm. & G. 246; *Goodlad v. Burnett*, 1 Kay & J. 341; *Ayer v. Estabrooks*, 2 N. Bruns. Eq. 392; *Dickerson's Appeal*, 55 Conn. 223, 10 Atl. 194, 15 Atl. 99; *McAleer v. Schneider*, 2 App. Cas. (D. C.) 461; *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750; *Briggs v. Briggs*, 69 Iowa 617, 29 N. W. 632; *Bourke v. Boone*, 94 Md. 472, 51 Atl. 396; *Kimball v. Ellison*, 128 Mass. 41; *Webb v. Archibald*, 128 Mo. 299, 34 S. W. 54; *Ellison v. Miller*, 11 Barb.

(N. Y.) 332; *Lent v. Lent*, 24 Hun (N. Y.) 436; *Brown v. Hamilton*, 135 N. C. 10, 102 Am. St. Rep. 526, 47 S. E. 128; *Price's Appeal*, 169 Pa. St. 294, 32 Atl. 455; *Williams v. Brice*, 201 Pa. St. 595, 51 Atl. 376; *Dearing v. Selvey*, 50 W. Va. 4, 40 S. E. 478.

¹⁴ *Hardenbergh v. Ray*, 151 U. S. 112, 38 L. Ed. 93, 14 Sup. Ct. 305. See, also: *Ross v. Ross*, 12 B. Mon. (51 Ky.) 437; *Applegate v. Smith*, 31 Mo. 166; *Jackson v. Holloway*, 7 Johns. (N. Y.) 394.

¹⁵ *Bunter v. Coke*, 1 Salk. 237.

¹⁶ *Bourke v. Boone*, 94 Md. 472, 51 Atl. 396.

tion to dispose of such after-acquired real property is not shown, although this rule is not uniform.¹⁷

§ 232. The Same Subject: Intention to Dispose of Entire Estate.

It is a well settled rule that when one undertakes to make a will, he intends to dispose of his entire estate.¹⁸ Again, it is not the rule or the policy of the law to declare partial intestacy if the will can be so construed as to prevent it.¹⁹ The intention of the testator, so far as it is

¹⁷ The statute of Minnesota provided as follows: "All property acquired by the testator after making his will shall pass therein in like manner as if possessed at the time of making the will, if it appears by the will that such was his intention." The will in question made no special reference to after-acquired property and there was no general or specific clause which the particular tract of land in question would pass even if the testatrix had owned it at the time she made the will. The lot in controversy was not in Toledo, Ohio. The clause of the will was as follows: "All my real estate and property and interest in real estate and property of whatever kind soever, situate and being in Toledo, Ohio." Held the lot was not disposed of by the will.—*Bedell v. Fradenburgh*, 65 Minn. 361, 68 N. W. 41.

Where the testator devises all his real estate at a particular place, or within a particular district of country, there is good reason to suppose he means to speak
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in reference to the lands he has already acquired there; but that if he intended to give to the devisee all the lands or real estate which he should afterwards purchase at any place, or within the specified district of country, there would have been something in his will indicating such an intention.—*Pond v. Bergh*, 10 Paige (N. Y.) 140.

Compare: *Cushing v. Aylwin*, 12 Metc. (Mass.) 169; *Woman's Union Missionary Society v. Mead*, 131 Ill. 33, 23 N. E. 603; *Fluke v. Fluke's Ex'rs*, 16 N. J. Eq. 478.

¹⁸ *Given v. Hilton*, 95 U. S. 591, 594, 24 L. Ed. 458, 460; *Higgins v. Dwen*, 100 Ill. 554; *Taubenhan v. Dunz*, 125 Ill. 524, 530, 17 N. E. 456; *Phelps v. Phelps*, 143 Mass. 570, 10 N. E. 452; *Leigh v. Savidge's Exrs.*, 14 N. J. Eq. 124; *Vernon v. Vernon*, 53 N. Y. 351; *Gilpin v. Williams*, 17 Ohio St. 396; *Gourley v. Thompson*, 2 Sneed (34 Tenn.) 387; *Appeal of Boards of Missions of United Presbyterian Church*, 91 Pa. St. 507.

¹⁹ *Lett v. Randall*, 10 Simons,

consistent with the rules of law, must govern the construction of a will. When the intention of the testator may be reasonably inferred from the will, taking it as a whole, the court must construe the instrument so as to carry out such intention, even against strict grammatical rules, and to effect the evident intention, words and limitations may be transposed, applied or rejected.²⁰

§ 233. The Same Subject: The General Rule.

It has been held that although the intention of the testator must govern, yet if there is nothing in the will which would cause the court to infer one way more strongly than another as to whether the testator did or did not intend to devise after-acquired realty, such land will be considered as undevised and will descend to the heirs.²¹ The reasoning of such a rule may be questioned,

112; *Given v. Hilton*, 95 U. S. 591, 594, 24 L. Ed. 458, 460; *Marion v. Williams*, 9 Mackey (D. C.) 20; *Schuck v. Shook*, 10 N. Y. Supp. 936; *Thomas v. Snyder*, 43 Hun (N. Y.) 15; *Delehanty v. St. Vincent's Orphan Asylum*, 56 Hun (N. Y.) 57, 8 N. Y. Supp. 797; *Vernon v. Vernon*, 53 N. Y. 351; *Welborn v. Townsend*, 31 S. C. 408, 10 S. E. 96.

²⁰ *Doe d. Leach v. Micklem*, 6 East 486; *Doe d. Cotton v. Stenlake*, 12 East 515; *Marshall v. Hopkins*, 15 East 309; *Spark v. Purnell*, Hob. 75; *Montagu v. Nuccella*, 1 Russ. 165; *Boon v. Cornforth*, 2 Ves. Sen. 277.

²¹ *Smith v. Edrington*, 8 Cranch (U. S.) 66, 3 L. Ed. 490; *Walton's Heirs v. Walton's Exr.*, 7 J. J.

Marsh. (Ky.) 58; *Smith v. Hutchinson*, 61 Mo. 83.

In *Flournoy's Devisees v. Flournoy's Exec.*, 64 Ky. (1 Bush) 515, the court says: "If, from the will itself, it shall appear more reasonable to infer an intention that after-acquired land should pass by it than that it should remain undevisable, then it would pass by the will; otherwise, if the contrary intention shall seem more reasonable, land will descend. And if there is nothing in the will to lead to one deduction rather than the other, land acquired by the testator after its publication should descend as estate undevised."

In *Dennis v. Warder*, 3 B. Mon. (42 Ky.) 174, the court says: "The

since partial intestacy is not favored, and when a testator executes a will, it is presumed that he intended to dispose of his entire estate. On the other hand, however, the material circumstances of the testator may be greatly altered after he has executed his will. His wealth may diminish and subsequently acquired real property may be simply personalty converted into realty; or new lands acquired may be the result of subsequently accumulated riches. It may reasonably occur that the testator becomes possessed of realty regarding which he had no thought at the time of the execution of his will. However, should his circumstances be so altered that a previously executed will does not state his desires, it would be natural that the testator would make a new disposition. The right to dispose of after-acquired realty is statutory, yet the right to devise property at all is statutory, and the statutes of the various jurisdictions which allow devises of after-acquired realty are not uniform. The better rule seems to be that the testator when making the will intends to dispose of all property which he may

testator declared his intention to dispose by will, of such estate 'as it (had) pleased God to bless (him) with.' And there is nothing in the entire will which, so far as land was concerned, extended that purpose beyond what he then owned. The fact that the will did not devise real estate directly to the children, but only gave a power to his executors to sell it for their benefit, can not affect the legal construction as to what real estate was embraced by the devise."

In *McAleer v. Schneider*, 2 App. Cas. (D. C.) 461, where the lan-

guage of the will was "I give to my sister . . . all my belongings if she feels like making a present to M. J. M. and J. F. J.," the court held the expression referred only to personal property and that after-acquired realty did not pass.

In *Webster v. Wiggin*, 19 R. I. 73, 28 L. R. A. 510, 31 Atl. 824, where the will in question contained no express terms referring to property which the testator might acquire after its execution, and the property which he devised was described in a general manner, it was held that after-acquired realty did not pass.

possess at the time of his death. But since the courts can not supply an intention, if it can not be reasonably inferred from the will itself, after giving a liberal construction to the statutes granting the power to devise after-acquired realty, that the testator desired such property to pass to some designated person, it should be considered as undevised; yet the fact that the testator speaks in the present tense and does not specifically refer to property which he may subsequently possess, will not prevent after-acquired realty from passing. The use of such words as "all my estate," "all my land and personal property," and similar expressions without specifically mentioning real property which he might thereafter acquire, have been held sufficient to pass lands which come into the possession of the testator after the execution of the will.²²

²² *Goodlad v. Burnett*, 1 Kay & J. 341; *Webb v. Byng*, 1 Kay & J. 580; *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229; *In re Ord*, 12 Ch. Div. 22; *Lilford v. Keck*, 30 Beav. 300; *Patty v. Goolsby*, 51 Ark. 61, 9 S. W. 846; *Liggatt v. Hart*, 23 Mo. 127; *Applegate v. Smith*, 31 Mo. 166; *Hale v. Audsley*, 122 Mo. 316, 26 S. W. 963; *Brimmer v. Sohler*, 1 Cush. (Mass.) 118; *Winchester v. Forster*, 3 Cush. (Mass.) 366; *Hill v. Bacon*, 106 Mass. 578; *Lovern v. Lamprey*, 23 N. H. 434; *Garrison v. Garrison*, 29 N. J. L. 153; *Smith v. Curtis*, 29 N. J. L. 345, 353; *Smith's Lessee v. Jones*, 4 Ohio 115; *Cresson's Appeal*, 76 Pa. St. 19; *Peters v. Spillman*, 18 Ill. 370; *Woman's Union Missionary Soc. v. Mead*, 131 Ill. 33, 23 N. E. 603.

In *Wait v. Belding*, 24 Pick. (Mass.) 129, in a case arising before the amendment of the law regarding devises of after-acquired realty, Chief Justice Shaw says: "In general, a will looks to the future; it has no operation, either on real or personal property, till the death of the testator. General words, therefore, may as well include what the testator expects to acquire, as what he then actually holds. The term, 'all my property,' may as well include all which may be his at his decease, as all which is his at the date of the will, and will be construed to be so intended, unless there are words in the description which limit and restrain it."

The following language in a

§ 234. The Same Subject: Statutory Regulations.

The statutes of various jurisdictions conferring the right to devise after-acquired real property are not uniform; in some jurisdictions the enactment is that the will must be held to convey all real property owned by the testator at the time of his death unless it clearly appear from the will that he intended otherwise; in other jurisdictions the effect of the enactment has been that after-acquired real estate will not pass unless from the will it clearly appears that it was the intention of the testator that it should so pass. The statutes, however, in all cases have been liberally construed and it is not necessary that the intention of the testator be declared in express terms; the will is sufficient to dispose of after-acquired real property if, taking the will as a whole, such an intention can be reasonably drawn.²³

§ 235. Of What Date Is a Will Presumed to Speak?

A will does not become effective until the death of the testator, yet where a testamentary instrument is executed many years before the death of its maker it is important, and often necessary, to determine whether the testator had in mind his property as it existed at the date of the execution of the will or whether he was re-

will: "I bequeath all my property, real and personal, wheresoever the same may be, to my beloved wife," was held to carry after-acquired realty.—*Peters v. Spillman*, 18 Ill. 370.

The following language in a will: "I give and bequeath the care, profits, and benefits of my whole estate, real and personal, so long as she remains my widow," was held to carry after-

acquired realty.—*Willis v. Watson*, 4 Scam. (5 Ill.) 64.

²³ *Briggs v. Briggs*, 69 Iowa 617, 29 N. W. 632; *Woman's Union Missionary Society v. Mead*, 131 Ill. 33, 23 N. E. 603; *Paine v. For- saith*, 84 Me. 66, 24 Atl. 590; *Brimmer v. Sohler*, 1 Cush. (Mass.) 118; *Wait v. Belding*, 24 Pick. (Mass.) 129; *Doe v. Wynne*, 23 Miss. 251, 57 Am. Dec. 139; *James v. Pruden*, 14 Ohio St. 253.

ferring to property which he might possess at the time of his death. In other words, from what time does a will speak? Under the old rule of the common law that real property acquired by the testator subsequent to the execution of his will would not pass thereunder, a devise of realty spoke as of its date only; but as to bequests of personal property, the will took effect as of the date of the testator's death.²⁴ In England, however, by the statute of 1 Victoria, ch. 26, this rule was changed, it being enacted that every will, either as to realty or personalty, should be considered as if it had been executed immediately before the death of the testator, unless a contrary intention should appear by the will.²⁵ Similar statutes have been enacted in practically all of these United States.²⁶ Such statutory regulations, therefore, must be considered in connection with the question as to what property will pass under a certain devise or bequest. Because of the laws referred to, an apparent con-

²⁴ *Delacherois v. Delacherois*, 11 H. L. Cas. 62; *Trinder v. Trinder*, L. R. 1 Eq. 695; *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229; *Gold v. Judson*, 21 Conn. 616; *Jones v. Shewmake*, 35 Ga. 151; *Marshall's Heirs v. Porter*, 10 B. Mon. (Ky.) 1, 2; *Haven v. Foster*, 14 Pick. (Mass.) 534; *George v. Green*, 13 N. H. 521; *Thornal v. Force's Ex'rs*, 29 N. J. Eq. 220; *Van Vechten v. Van Veghten*, 8 Paige (N.Y.) 104; *Raines v. Barker*, 13 Grat. (Va.) 128, 67 Am. Dec. 762.

See ante, § 28.

²⁵ Sec. 24 of the Statute of 1 Victoria, ch. 26, reads as follows: "That every will shall be construed, with reference to the real

estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." This section has been substantially enacted in many jurisdictions in the United States.

Sec. 34 of the Statute of 1 Victoria, ch. 26, provided "that every will re-executed or republished, or revived by any codicil, shall, for the purposes of this act, be deemed to have been made at the time at which the same shall be re-executed, republished or revived."

²⁶ *Stimson's Am. Stat. Law*, § 2806.

flict of decisions has arisen. In England, prior to the statute of 1 Victoria, ch. 26, which not only prescribed that wills should speak as of the date of the death of the testator, but also provided that after-acquired real property would pass to a general or residuary devisee, the decisions are naturally in conflict with those handed down after the statute; and likewise the same confusion will be found in cases decided in the United States.²⁷

§ 236. The Same Subject: Common Law Rule.

At common law a specific bequest was supposed to refer to property answering the description at the date of the will, hence subsequent changes in property so bequeathed operated as an ademption thereof.²⁸ A bequest of certain

²⁷ Statutes which abolished the rule of the old common law that real property acquired after the execution of a will would not pass thereunder, have been construed to apply to wills which were executed prior to such enactments, where the testator died after they became effective. See *Cushing v. Aylwin*, 12 Metc. (Mass.) 169; *Pray v. Waterston*, 12 Metc. (Mass.) 262; *Wakefield v. Phelps*, 37 N. H. 295; *Perkins v. George*, 45 N. H. 453; *Pond v. Bergh*, 10 Paige (N. Y.) 140; *Lynes v. Townsend*, 33 N. Y. 558; *Quinn v. Hardenbrook*, 54 N. Y. 83.

Contra to the above citations, see *Carroll v. Carroll's Lessee*, 16 How. (U. S.) 275, 14 L. Ed. 936; *Brewster v. McCall's Devisees*, 15 Conn. 274; *Mullock v. Souder*, 5 Watts & S. (Pa.) 198.

²⁸ *Pattison v. Pattison*, 1 Myl. & K. 12; *Abney v. Miller*, 2 Atk. 593; *Hone v. Medcraft*, 1 Bro. C. C. 261; *Coppin v. Fernyhouse*, 2 Bro. C. C. 291; *James v. Dean*, 11 Ves. Jun. 383; *Slatter v. Noton*, 16 Ves. Jun. 197.

Compare: *Thellusson v. Woodford*, 13 Ves. Jun. 209; *Hance v. Truwhitt*, 2 Johns. & H. 216; *Churchman v. Ireland*, 1 Russ. & M. 250, overruling *Back v. Kett*, Jacob 534.

As to a renewal of a leasehold revoking a specific bequest, see *Coppin v. Fernyhouse*, 2 Bro. C. C. 291; *Slatter v. Noton*, 16 Ves. Jun. 197; *Hone v. Medcraft*, 1 Bro. C. C. 261.

As to a renewed lease passing when the privilege of renewal was included, see *Carte v. Carte*, 3 Atk. 174; *James v. Dean*, 11 Ves.

stock owned by the testator at the time he made his will did not include stock of the same character subsequently acquired, even though such stock had been sold and similar stock thereafter purchased.²⁹ Words in the present tense, such as "all the property I possess in the public funds," were held to mean the same as "all I now possess," referring to the date of the execution of the will.³⁰ A gift to descendants "now living" has been held to exclude those born after the will was signed.³¹ And where a decedent in his will referred to a condition or state of affairs actually existing when the instrument was executed, his language was construed as referring to the date of the will,³² as: "the house where I now reside," or "the estate whereof I am now seised."³³

Jun. 383, 387; *Colgrave v. Manby*, 2 Russ 238.

As to an assignment of a lease, see *Woodhouse v. Okill*, 8 Sim. 115.

As to subsequently purchased stock, see *Banks v. Thornton*, 11 Hare 176.

²⁹ *Pattison v. Pattison*, 1 Myl. & K. 12; *Wilde v. Holtzmeyer*, 5 Ves. Jun. 811.

³⁰ *Cockran v. Cockran*, 14 Sim. 248; *Wilde v. Holtzmeyer*, 5 Ves. Jun. 811.

³¹ *Crossley v. Clare*, Ambl. 397; *James v. Richardson*, T. Jones 99; *Burchett v. Durant*, 2 Vent. 311, 313.

Compare: *All Souls' College v. Codrington*, 1 P. Wms. 595.

Contra: *Rowland v. Gorsuch*, 2 Cox 187.

³² *Douglas v. Douglas*, Kay 400; *Abney v. Miller*, 2 Atk. 593; *Hutchinson v. Barrow*, 6 Hurl. & N. 583; *Gold v. Judson*, 21 Conn. 616; *Ross v. Ross*, 12 B. Mon. (Ky.) 437; *Everett v. Carr*, 59 Me. 325; *Morse v. Mason*, 11 Allen (Mass.) 36; *Butler v. Butler*, 3 Barb. Ch. (N. Y.) 304; *Quinn v. Hardenbrook*, 54 N. Y. 83; *Fairfield Tp. (Board of Education) v. Ladd*, 26 Ohio St. 210; *Anshutz v. Miller*, 61 Pa. St. 212.

³³ *Cole v. Scott*, 16 Sim. 259; *Douglas v. Douglas*, Kay 400; *Hutchinson v. Barrow*, 6 Hurl. & N. 583.

§ 237. The Same Subject: The Statute of 1 Victoria, ch. 26, Affects Only the Subject Matter Disposed of, Not the Beneficiaries.

Section 3 of the statute of 1 Victoria, ch. 26, merely gives the right to devise real property acquired by the testator subsequent to the execution of his will. Section 24 of the same statute provides that as to the *subject matter*, a will speaks as of the death of the testator unless a contrary intention is expressed; but as to beneficiaries under the will, the statute makes no provision as to the time from which the will shall speak. This point is to an extent covered by sections 32 and 33 of the statute, they providing, generally, that if a devisee of an estate tail or estate in quasi-entail, or a child of a testator to whom property is devised or bequeathed, should die during the life of the testator and leave issue surviving the testator, such devises or bequests shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will. The sections last mentioned, however, in all cases, would not apply as, for instance, where the devise or bequest was in favor of the servants of the testator,³⁴ or of the wife of B.³⁵ The servants of the testator at his death may be other than those in his employment when he made his will, and the wife of B may die and B remarry. Therefore, the rule of the common law is still in force and effect as to beneficiaries designated by will, as to them

Contra: *Wagstaff v. Wagstaff*,
L. R. 8 Eq. 229; *In re Midland Ry.*
Co., 34 Beav. 525.

Compare: *Chamberlain v. Turner*,
Cro. Car. 129.

34 *Parker v. Marchant*, 1 Yo. &

Coll. Ch. 290; *Darlow v. Edwards*,
1 H. & C. 547.

35 *Walter v. Parrott*, 33 Ch. Div.
274.

Compare: *Peppin v. Bickford*,
3 Ves. 570.

the will speaking as of the date of execution, except where the statute provides to the contrary or the language of the instrument clearly expresses a different intention.³⁶

§ 238. The Same Subject: General Rule in England.

Although verbs used in the present tense have sometimes had the effect of restricting devises to the subjects or objects existing at the date of the will,³⁷ yet where there seems to be no special reason for throwing any emphasis upon the term, the verb will be held to refer to the time of the testator's death. For instance, such phrases as "am seised" or "am possessed" will include everything of which the testator was so seised or which he held in possession at the time of his demise.³⁸ A bequest of a leasehold is held not adeemed by the expiration and the renewal of the lease; and a subsequently acquired fee in the same property, although described as

³⁶ The rule has been so strictly applied with reference to a gift to a child who died before the testator, as to cut off another child of the testator born after the execution of the will.—*Foster v. Cook*, 3 Bro. C. C. 347.

Compare: *Perkins v. Micklethwaite*, 1 P. Wms. 274.

The oldest or youngest child has been held to refer to the one answering the description when the will was made.—*Butler v. Butler*, 3 Barb. Ch. (N. Y.) 304.

A devise to one for life, with remainder to his widow, refers to the wife of the life-tenant at the

date of the execution of the will.—*Anshutz v. Miller*, 81 Pa. St. 212.

Compare: *Ringrose v. Bramham*, 2 Cox 384.

³⁷ *Wilde v. Holtzmeyer*, 5 Ves. Jun. 811.

Compare: *Bridgman v. Dove*, 3 Atk. 201; *Bland v. Lamb*, 2 Jacob & W. 399; *Ringrose v. Bramham*, 2 Cox 384.

³⁸ *Doe d. York v. Walker*, 12 Mees. & W. 591; *Langdale v. Briggs*, 3 Smale & G. 246; *Lilford v. Keck*, 30 Beav. 300; *Everett v. Everett*, 7 Ch. Div. 428; *In re Ord*, 9 Ch. Div. 667.

a term for years, passes under the bequest.³⁹ Likewise a devise of real estate described generally as situated in a certain locality, or designated by some commonly known name, speaking from the death of the testator, will embrace additions to the original estate.⁴⁰ And where all the testator's stock of a certain description is given by will, subsequent purchases of stock of the same description will be included.⁴¹

Where the specific article bequeathed is incapable of increase or diminution, there is an indication of a contrary intention sufficient to bring it within the exception to the general rule that the will shall speak as of the date of the death of the testator unless a contrary intention appear.⁴² As, for example, "my one thousand North British preference shares,"⁴³ or a definite amount of stock,⁴⁴ or a debt of a designated amount, referred to in the will, has been construed to mean the shares, stock or debt existing at the date of the will.⁴⁵

§ 239. The Same Subject: Rule in the United States.

In practically all of these United States, various statutes are now in force, the effect of which, with the decisions under them, is that all wills are to be construed, both as to real and personal property, as if made imme-

³⁹ *Miles v. Miles*, L. R. 1 Eq. 462; *Cox v. Bennett*, L. R. 6 Eq. 422; *Wedgwood v. Denton*, L. R. 12 Eq. 290.

⁴⁰ *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229; *Castle v. Fox*, L. R. 11 Eq. 542.

⁴¹ *Goodlad v. Burnett*, 1 Kay & J. 341; *Drake v. Martin*, 23 Beav. 89; *Trinder v. Trinder*, L. R. 1 Eq. 695.

⁴² *In re Gibson*, L. R. 2 Eq. 669.

⁴³ *In re Gibson*, L. R. 2 Eq. 669.

Compare: *Emuss v. Smith*, 2 De Gex & S. 722, 733.

⁴⁴ *Pattison v. Pattison*, 1 Myl. & K. 12; *In re Gibson*, L. R. 2 Eq. 669.

⁴⁵ *Sidney v. Sidney*, L. R. 17 Eq. 65.

diately before the death of the testator, unless a contrary intention appear in the will.⁴⁶ The effect of such statutes has been held to be prospective only and not to cover wills executed prior to the passage of such acts, although the testator did not die until afterward, unless the will be republished; yet on the other hand, since wills do not become effective until the death of the maker, it

⁴⁶ *Blakeney v. Du Bose*, 167 Ala. 627, 52 So. 746; *In re Lux's Estate*, 149 Cal. 200, 85 Pac. 147; *In re Wells' Estate*, 142 Iowa 255, 120 N. W. 713; *Courtney v. Courtney*, 149 Iowa 645, 129 N. W. 52; *Garrison v. Day*, 36 Ind. App. 543, 76 N. E. 188; *Aneshaensel v. Twyman*, 42 Ind. App. 354, 85 N. E. 788; *Meserve v. Meserve*, 63 Maine 518; *Blaney v. Blaney*, 1 Cush. (Mass.) 107; *Brimmer v. Sohler*, 1 Cush. (Mass.) 118; *Crapo v. Price*, 190 Mass. 317, 76 N. E. 1043; *Sibley v. Maxwell*, 203 Mass. 94, 89 N. E. 232; *Clark v. Mack*, 161 Mich. 545, 28 L. R. A. (N. S.) 479, 126 N. W. 632, 17 Det. Leg. N. 378; *Cox v. Jones*, 229 Mo. 53, 129 S. W. 495; *Fluke v. Fluke's Exrs.*, 16 N. J. Eq. 478; *Garrison v. Garrison*, 29 N. J. L. 153; *Simpson v. Trust Co.*, 112 N. Y. Supp. 370; *Simpson v. Trust Co.*, 129 App. Div. 200, 113 N. Y. Supp. 370; *In re Chapman's Estate*, 133 App. Div. 337, 117 N. Y. Supp. 679; *In re Hendrickson*, 140 App. Div. 388, 125 N. Y. Supp. 309; *Ridenour v. Callahan*, 8 Ohio C. C. (N. S.) 585; *Scott v. Ford*, 52 Ore. 288, 97 Pac. 99; *McKinley v. Mar-*

tin, 226 Pa. 550, 134 Am. St. Rep. 1076, 75 Atl. 734; *Robinson v. Harris*, 73 S. C. 469, 6 L. R. A. (N. S.) 330, 53 S. E. 755; *Farley v. Farley*, 121 Tenn. 324, 115 S. W. 921; *Connely v. Putnam*, 51 Tex. Civ. App. 233, 111 S. W. 164; *Strand v. Stewart*, 51 Wash. 685, 99 Pac. 1027.

Where the facts showed that a will was executed in contemplation of a settlement by the testator with his creditors, and was followed shortly by a conveyance pursuant to such plan of settlement, it was held that the will should be construed as speaking from the date of the conveyance.—*Cornwall v. Hill*, 135 Ky. 641, 117 S. W. 311.

Compare: *Smith v. Edrington*, 8 Cranch (U. S.) 66, 3 L. Ed. 490; *Walton's Heirs v. Walton's Exr.*, 7 J. J. Marsh. (Ky.) 58; *Smith v. Hutchinson*, 61 Mo. 83; *Van Wagener v. Brown*, 26 N. J. L. 196; *Board of Education of Fairfield Tp. v. Ladd, Admr.*, 26 Ohio St. 210; *Clarke's Estate*, 82 Pa. St. 528; *Thorndike v. Reynolds*, 22 Grat. (Va.) 21, 32.

has been held that such statutes cover all wills, whenever executed, if the testator dies after the law has gone into force.⁴⁷

§ 240. Right of Entry: Disseisin: Statutory Enactments.

The power to devise rights of entry of real property has been the subject of statutory enactments in many of the states. The right of devising interests in lands possessed adversely to the testator was expressly declared in Kentucky, New Hampshire, Massachusetts and Maine;⁴⁸ in other states the devisable nature of such interests would seem to have been implied under general enactments that any person claiming a right or title to real estate, although disseised thereof by adverse possession, may sell and transfer his interest as fully as if in actual possession.⁴⁹ In other states the common law was followed, and a grant, devise or conveyance of real estate, made and delivered when the property was in the actual possession of a person claiming title thereto ad-

⁴⁷ Where the statute did not affect wills executed prior thereto.—*Jones v. Shewmake*, 35 Ga. 151; *Gibbon v. Gibbon*, 40 Ga. 562; *Brigham v. Winchester*, 1 Metc. (Mass.) 390; *Battle v. Speight*, 31 N. C. 288; *Gable's Ex'rs v. Daub*, 40 Pa. St. 217; *Cogdell's Ex'rs v. Cogdell's Heirs*, 3 Desaus. (S. C.) 346; *McGavock v. Pugsley*, 12 Heisk. (59 Tenn.) 689; *Gibson v. Carrell*, 13 Grat. (Va.) 136.

Where the statute affected wills, although executed before its passage.—*Lovern v. Lamphrey*, 22 N. H. 434; *De Peyster v. Clendenning*, 8 Paige (N. Y.) 295; *Bishop*

v. Bishop, 4 Hill (N. Y.) 138; *Henderson v. Ryan*, 27 Tex. 670.

See, also, *Garrison v. Garrison*, 29 N. J. L. 153, where the statute fixed the date as to wills theretofore executed.

⁴⁸ *Stimson's Am. Stat. Law* (Jan. 1, 1886), § 1401; *Hyer v. Shobe*, 2 Munf. (Va.) 200.

⁴⁹ *Stimson's Am. Stat. Law* (Jan. 1, 1886), § 1401, citing the statutes then existing in Maine, Vermont, Illinois, Michigan, Wisconsin, Iowa, Minnesota, Kansas, Nebraska, Missouri, Arkansas, California, Oregon, Nevada, Colorado, Idaho, Montana, Wyoming, Utah, Georgia, Mississippi, and Arizona.

versely to the grantor or testator, was held void,⁵⁰ except that a valid grant or devise could be made, as at common law, to the person in possession of the land, the devise having the effect of a release.⁵¹ Under the old laws against champerty and maintenance, a right of action was not devisable,⁵² but this rule was destroyed by statute in England.⁵³ Then, by the Statute of Wills of 1 Vict., ch. 26, sec. 3, rights of entry became devisable and this rule is now generally followed in the United States.

§ 241. The Same Subject: May Be Devised.

The general rule now, both in England and in the United States, is that a person may lawfully dispose of, by will, all real and personal property which he may be entitled to, either at law or in equity, at the time of his death and which, if not so devised, bequeathed, or disposed of, would descend to his heirs or go to his personal representatives. Actual seisin of real property is not now required, a testator having the right to devise lands regarding which he has only the right of entry, including the right of entry after condition broken, such devise giving the devisee the right to take the necessary steps

⁵⁰ Stimson's Am. Stat. Law (Jan. 1, 1886), § 1401, citing the statutes then existing in Rhode Island, Connecticut, New York, North Carolina, Kentucky, Tennessee and Dakota.

⁵¹ Stimson's Am. Stat. Law (Jan. 1, 1886), § 1401, citing the statutes then in effect in Vermont, Connecticut, and North Carolina. See, also: Poor v. Robinson, 10 Mass. 131; Jackson v. Varick, 7 Cow. (N. Y.) 238; Davis v. Martin, 3 Munf. (Va.) 285.

⁵² Baker v. Hacking, Cro. Car. 387; Doe d. Cooper v. Finch, 1 Nev. & M. 130; Goodright v. Forester, 8 East 552, 564, 1 Taunt. 578; Cave v. Holford, 3 Ves. Jun. 650, 669; Attorney General v. Vigor, 8 Ves. Jun. 256, 282; Souter v. Hull, 2 Dowl. & R. 38; Culley v. Taylerson, 11 Ad. & E. 1008, 1020; Bunter v. Coke, Salk. 237.

⁵³ 1 Jarm. Wills (4th Eng. ed.), 50, citing 3 & 4 Wm. IV, ch. 27, § 36.

to recover possession, the same as the testator might have done.⁵⁴ Thus, where a statute authorizes any person to make a devise of any property held by him at the time of his death "in possession, reversion or remainder," the fact that a stranger has wrongfully taken possession of

⁵⁴ *Waring v. Jackson*, 1 Peters (U. S.) 571, 7 L. Ed. 702; *Atwood v. Weems*, 99 U. S. 183, 25 L. Ed. 471; *Patty v. Goolsby*, 51 Ark. 61, 9 S. W. 846; *Gist v. Robinet*, 3 Bibb (Ky.) 2; *May v. Slaughter*, 3 A. K. Marsh. (Ky.) 505; *Carroll v. Norwood*, 4 Har. & McH. (Md.) 287; *Hayden v. Stoughton*, 5 Pick. (Mass.) 528; *Jackson v. Varick*, 7 Cow. (N. Y.) 238; *Jackson v. Varick*, 2 Wend. (N. Y.) 294; *Stoever v. Whitman*, 6 Binn. (Pa.) 416; *Humes v. McFarlane*, 4 Serg. & R. (Pa.) 427; *Hyer v. Shobe*, 2 Munf. (Va.) 200.

Compare: *Goodright v. Forester*, 1 Taunt. 604.

In *Bailey v. Hoppin*, 12 R. I. 560, it was held that the word "seised" as used in a statute conferring the right of devising real property on persons who are seised thereof, is equivalent of "having." But in *Leach v. Jay*, 9 Ch. Div. 42, it was said that when the word is used in a will, as "real estate of which I may die seised," it has been construed not to embrace land to which the testator had only the right of entry.

In *Jackson v. Varick*, 7 Cow. (N. Y.) 238, it was held that where the term "seised" is used,

it applies to all lands to which a party has title or the right of entry.

In *Smithwick v. Jordan*, 15 Mass. 113, it was held that although a testatrix had signed an instrument purporting to convey all her title to certain real property to another, yet such conveyance having been determined to have been procured by fraud, it did not operate as a revocation of her will devising the same property, and was not such a disseisin as would prevent her from devising the land.

In Massachusetts, prior to the amendment of the statute, a party could not devise lands of which he was disseised at the time of the execution of the will and of which he continued to be so disseised until the time of his death.—*Poor v. Robinson*, 10 Mass. 131; *Ward v. Fuller*, 32 Mass. (15 Pick.) 185.

In Virginia, prior to 1787, a devise of land of which the testator was actually disseised at the time when he made his will and at the time of his death, was inoperative.—*Davis v. Martin*, 3 Munf. (Va.) 285.

the testator's lands does not affect his power to make a devise of the same.⁵⁵

§ 242. Right of Re-entry After Condition Broken: When Devisable.

As to the right of re-entry, the rule is often laid down that, in order to be devisable, it must be a present right existing at the death of the testator, not the possibility of a right which might arise in the future. Thus, if one should convey all his interest in certain real property, merely reserving the right of re-entry in the event of the breach of some condition subsequent, he would have parted with all title and would be possessed, not of an interest in reversion, but merely of the possibility of a reverter. The entire estate would be vested in the grantee subject only to be defeated should there be a breach of condition. There having been no breach of condition at the time of the death of the grantor, although the possibility of reverter would descend to his heirs, yet they would acquire no right of entry or title to the property until there had been a breach of condition, and it has therefore been held that such possibility of reverter can not be devised.⁵⁶ This rule, however, is not universal, for it has been held that where a grantor has transferred real property subject to a condition subsequent, the event of which would cause the property to revert to him, although at the time of his death he may not have a present right

⁵⁵ *May's Heirs v. Slaughter*, 3 A. K. Marsh. (10 Ky.) 505. See, also, *Whittemore v. Bean*, 6 N. H. 47.

⁵⁶ *Ruch v. Rock Island*, 97 U. S. 693, 24 L. Ed. 1101; *Presbyterian Church v. Venable*, 159 Ill. 215, 50 Am. St. Rep. 159, 42 N. E. 836;

Southard v. Central Railroad Co., 26 N. J. L. 13, 91; *Vail v. Long Island Railroad Co.*, 106 N. Y. 283, 287, 60 Am. Rep. 449, 12 N. E. 607; *Upington v. Corrigan*, 151 N. Y. 143, 37 L. R. A. 794, 45 N. E. 359; *Deas v. Horry*, 2 Hill Eq. (S. C.) 244.

of entry, but only a contingent possible estate, yet that he has such an interest as may be devised and which will pass under a general residuary clause.⁵⁷ And a possibility, coupled with an interest, may be devised where the person in whom the interest will vest, in the event of the possibility, is certain or may be ascertained.⁵⁸

Vested estates in real property are devisable, although liable to be defeated by the non-performance of a condition subsequent or the happening of some contingent event.⁵⁹ Even the bare possession of lands without title is devisable, and the interest conferred may be defended against all but the true owners.⁶⁰

§ 243. Contingent Interest in Real Property, Where the Party Who Is to Take Is Uncertain.

An estate in real property, distinguished from a mere possibility, whether present or future, legal or equitable, vested or contingent, may be devised, providing, of course, that it is not such an estate as will terminate with the life of the testator. Contingent, springing and executory uses, where the person who is to take is certain, are devisable.⁶¹ A general devise of all the real property

⁵⁷ Jones v. Roe, 3 Durn. & E. 88; s. c., 1 H. Bl. Rep. 30; Clapp v. Stoughton, 27 Mass. (10 Pick.) 463; Austin v. Cambridge Parish, 38 Mass. (21 Pick.) 215.

⁵⁸ Pond v. Bergh, 10 Paige Ch. (N. Y.) 140. See, also, Roe d. Noden v. Griffith, 1 W. Bl. Rep. 605; Moor v. Hawkins, 2 Eden 342.

⁵⁹ Pinbury v. Elkin, 1 P. Wms. 563; Ingram v. Girard, 1 Houst. (Del.) 276; Winslow v. Goodwin, 7 Metc. (Mass.) 363.

⁶⁰ Asher v. Whitlock, L. R. 1 I Com. on Wills—19

Q. B. 1; Smith v. Bryan, 12 Ired. (N. C.) 11.

⁶¹ Jones v. Roe, 3 Durn. & E. (T. R.) 88; s. c., 1 H. Bl. Rep. 30; Whitfield v. Fausset, 1 Ves. Sen. 391; Wright v. Wright, 1 Ves. Sen. 411; Goodtitle v. Wood, Willes 211; Perry v. Jones, 1 H. Bl. Rep. 30; Moore v. Hawkins, 2 Eden 342; Ingliby v. Amcotts, 21 Beav. 585; Countess of Bridgewater v. Bolton, 1 Salk. 236; Blakely v. Quinlan, 101 Ky. 52, 39 S. W. 513; Woodman v. Woodman, 89 Me.

which the testator may own at the time of his death will carry every interest which he has in such real property, whether such interest be in possession, reversion, or remainder, and whether absolute or contingent.⁶² But where some future event is to decide as to the person to

129, 35 Atl. 1037; *Heard v. Read*, 169 Mass. 216, 47 N. E. 778; *Varick v. Edwards*, 1 Hoff. Ch. (N. Y.) 383; *Wimple v. Fonda*, 2 Johns. (N. Y.) 288; *Lawrence v. Bayard*, 7 Paige (N. Y.) 70; *Kenyon v. See*, 94 N. Y. 563; *Court v. Bankers' Trust Co.*, 160 N. Y. Supp. 477; *Lindsley v. Dennis*, 6 N. J. L. J. 246; *Den v. Manners*, 20 N. J. L. 142; *Lewis v. Smith*, 23 N. C. 145; *Thompson's Lessee v. Hoop*, 6 Ohio St. 480; *Theological Seminary v. Wall*, 44 Pa. 353; *Buist v. Dawes*, 4 Strobb. Eq. (S. C.) 37; *Davis v. Bawcum*, 57 Tenn. 406; *Turpin v. Turpin*, Wythe (Va.) 137; *Carney v. Kain*, 40 W. Va. 758, 23 S. E. 650.

In *Roe d. Noden v. Griffiths*, 1 W. Bl. Rep. 605, Lord Mansfield says: "That, in all contingent, springing and executory uses, where the person who is to take is certain, so that the same may be descendible; they are also devisable. They are convertible terms."

In *Bailey v. Hoppin*, 12 R. I. 560, it was held that under the statutes of Rhode Island, the word "seised," when used in connection with the conferring of the right to devise real estate upon persons "seised" thereof, has the same

meaning as "having," and authorizes the devise of equitable and contingent remainders.

One having a vested remainder in real property may devise the same, even though he die prior to the life tenant.—*Eckle v. Ryland*, 256 Mo. 424, 165 S. W. 1035.

An equitable interest in real property, such as a resulting trust, is devisable.—*Booth v. Cheek*, 253 Mo. 119, 161 S. W. 791.

An equitable estate may be willed the same as a legal estate.—*Meador v. Sorsby*, 2 Ala. 712, 36 Am. Dec. 432.

Contingent interests in both real and personal property may be devised or bequeathed the same as vested interests.—*Winslow v. Goodwin*, 7 Metc. (Mass.) 363.

A reversionary interest in real property may be devised.—*Alexander v. De Kermel*, 81 Ky. 345.

A vested remainder in real property, although liable to be defeated by the exercise by the grantor of a reserved power of appointment or by the death of the remainderman prior to that of the grantor, may be devised.—*Court v. Bankers' Trust Co.*, 160 N. Y. Supp. 477.

⁶² *Pond v. Bergh*, 10 Paige Ch. (N. Y.) 140.

whom a future or contingent interest in real property is directed, thus making it impossible to determine in whom the interest will vest until the happening of the contingency, as, for instance, where the existence of the testator at some particular future time is to determine whether he is or is not to receive any interest in the property, there appears to be no interest in the testator which he can devise.⁶³ Although the statute may provide that no legacy or devise shall lapse or fail of taking effect because of the death of the legatee or devisee prior to that of the testator, but that the interest in the property so bequeathed or devised shall pass to the heirs of such legatee or devisee, yet this does not give the legatee or devisee whose death occurs prior to that of the testator the right to dispose of such property by will, but it passes under the laws of succession.⁶⁴ And possibilities not coupled with an interest, as the expectancy of an heir of inheriting certain real property, can not be devised, since it is a mere possibility, as the property may be otherwise disposed of during the life of the owner or devised to some one else at his death.⁶⁵

⁶³ *Loring v. Arnold*, 15 R. I. 428, 8 Atl. 335. See, also, *Doe d. Calkin v. Tomkinson*, 2 M. & S. 165; *Brown v. Williams*, 5 R. I. 309; *Bailey v. Hoppin*, 12 R. I. 560.

⁶⁴ *Halsey v. Convention of Protestant Episcopal Church*, 75 Md. 275, 23 Atl. 781; *Pate v. Pate*, 40 Miss. 750.

⁶⁵ *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85, where a testatrix bequeathed to her daughter a one-fifth share of her estate with the power, if she did not marry, to dispose of the same by will

after the death of the testatrix, and in the event she did not so dispose of it, then the interest was to go to the granddaughters of the testatrix, the daughter dying during the life of the testatrix, it was held she had no interest in the property which she could devise, and a devise in her (the daughter's) will disposing of such interest in the property was held premature and not to defeat the rights of the granddaughters.—*Hall's Estate, In re*, 26 Md. 107.

§ 244. Interests in Lands Founded on Contracts of Sale and Purchase.

An equitable interest in lands, founded upon valid and binding articles of agreement for the purchase and sale of the same, may be devised.⁶⁶ A person who has contracted to purchase lands is, in equity, considered the owner and he may devise his interest therein;⁶⁷ and a person who has contracted to sell lands may devise them, the devisee taking them subject to the interest which the vendee has under his contract.⁶⁸ Although a party may have executed a written agreement to sell real property belonging to him, and although the purchaser may have taken possession, yet his interest in the property and in the notes given in payment thereof may pass by his will.⁶⁹ This presumes a valid and enforceable contract, for the rights of the heir or devisee of either of the parties, seller or purchaser, depend upon the binding effect of the contract upon the one or the other at the time of death.⁷⁰ If an enforceable contract against a purchaser did not exist at the time of his death, as where the title of the vendor was defective, his heir at law or devisee could not claim the land as realty or compel the executor

⁶⁶ *Broome v. Monck*, 10 Ves. Jun. 597; *Hudson v. Cook*, L. R. 13 Eq. 417; *Ingle v. Richards*, 28 Beav. 366; *Sargent v. Simpson*, 8 Greenl. (8 Me.) 148, 149; *Malin v. Malin*, 1 Wend. (N. Y.) 625; *Matter of Champion*, 45 N. C. 246; *Bailey v. Hoppin*, 12 R. I. 560, 569. See, also, *Whittaker v. Whittaker*, 4 Bro. C. C. 31, the ruling in which was questioned by Lord Eldon in *Broome v. Monck*, 10 Ves. Jun. 597.

⁶⁷ *Marston v. Roe d. Fox*, 8 Ad. & E. 14; *Malin v. Malin*, 1 Wend. (N. Y.) 625.

⁶⁸ *Flagg v. Teneick*, 29 N. J. L. 25; *McCarty v. Myers*, 5 Hun (N. Y.) 83.

⁶⁹ *Atwood v. Weems*, 99 U. S. 183, 25 L. Ed. 471.

⁷⁰ *Hudson v. Cook*, L. R. 13 Eq. 417; *Ingle v. Richards*, 28 Beav. 366; *Haynes v. Haynes*, 1 Dr. & Sm. 426, 451.

or administrator to pay the purchase money for other lands.⁷¹

Real property, as soon as contracted to be sold, is considered in equity to have been converted into personalty; the legal title to the land remains in the seller but he is deemed to hold it merely as security for the payment of the debt contracted. A specific devise of the lands only would carry with it merely the real property which would be subject to the contract of purchase, but would not pass the purchase money, when paid, to the devisee. The money would be paid to the executor or administrator of the estate and would be subject to the debts of the decedent; upon distribution it would pass to the residuary legatee.⁷² An outstanding option to purchase, there being no obligation on the holder thereof to pay for the land unless he so desired, has been distinguished from the above case, and the option being exercised after the testator's death, it was held that the purchase money passed to the devisee.⁷³

One who is bound by a valid agreement to purchase lands is considered, in equity, the owner. If he dies before having acquired the legal title, the estate will pass

⁷¹ *Broome v. Monck*, 10 Ves. Jun. 597, overruling, on this point, *Whittaker v. Whittaker*, 4 Bro. C. C. 31; *Buckmaster v. Harrop*, 7 Ves. Jun. 341.

⁷² *Fletcher v. Ashburner*, 1 Bro. C. C. 497; *Townley v. Bedwell*, 14 Ves. Jun. 591; *Wall v. Bright*, 1 Jac. & W. 474; *Lawes v. Bennett*, 1 Cox 167; *Gould v. Teague*, 5 Jur. (N. S.) 116; *Weeding v. Weeding*, 1 J. & H. 424; *Craig v. Leslie*, 3 Wheat. (U. S.) 563, 4 L. Ed. 460;

Haughwout v. Murphy, 22 N. J. Eq. 531, 541; *McKinnon v. Thompson*, 3 Johns. Ch. (N. Y.) 307; *Moore v. Burrows*, 34 Barb. (N. Y.) 173; *Williams v. Haddock*, 145 N. Y. 144, 39 N. E. 825.

Compare: *Welles v. Cowles*, 4 Conn. 182, 10 Am. Dec. 115; *Neal v. Knox & L. R. Co.*, 61 Me. 298; *Goodwin v. Milton*, 25 N. H. 458.

⁷³ *Drant v. Vause*, 1 You. & Coll. C. C. 580; *Flagg v. Teneick*, 29 N. J. L. 25.

to his heir or devisee. When one contracts to purchase lands, the money is deemed to have been converted into real property which passes to the heir or devisee, but the decedent having been liable for the purchase price, his estate may be called upon to pay the same.⁷⁴

§ 245. Interests in Trust.

Where a trust has been created for the personal benefit of a designated beneficiary during his life, the trust terminates at his death and there remains over no interest which he can dispose of by will; but the case is otherwise where the interest of the beneficiary is absolute, the trustees (so-called) taking neither the legal nor the equitable title, their status being more advisory than controlling.⁷⁵ As to the trustee, if he acts in a personal or confidential capacity, the trust relationship terminates at his death and there is nothing regarding it which he can devise or bequeath.⁷⁶

§ 246. Estates *Pur Autre Vie*.

An estate *pur autre vie* is an estate of freehold, during the life of another called the *cestui que vie*.⁷⁷ If limited to

⁷⁴ Whittaker v. Whittaker, 4 Bro. C. C. 31; Broome v. Monck, 10 Ves. Jun. 597; Garnett v. Acton, 28 Beav. 333; Williams v. Hassell, 73 N. C. 174; Champion v. Brown, 6 Johns. Ch. (N. Y.) 398, 10 Am. Dec. 343.

⁷⁵ Hemingway v. Hemingway, 22 Conn. 462.

Where a woman, just prior to her marriage, conveyed real property of her own to a trustee, for her exclusive use, free from the debts and control of her husband, she reserving no power of dispo-

sition, upon her death the objects of the trust were fully satisfied, and since under the Statute of Wills of Virginia a married woman has no power to devise her lands except by virtue of some power conferred or reserved by deed, the property reverted to her heirs.—Wilkinson v. Wright, 6 B. Mon. (45 Ky.) 576.

⁷⁶ Hinckley v. Hinckley, 79 Me. 320, 9 Atl. 897.

⁷⁷ Coke, Litt. (1st Am. Ed.) Lib. 1, ch. 6, § 56, p. 41b.

the grantee alone, upon his death prior to that of the *cestui que vie*, the land was open to occupancy by any one who might desire to enter, and any one thus entering was designated a *general occupant*. If the estate was granted to a man and his heirs, upon the death of the owner of the estate prior to that of the *cestui que vie*, the heir might enter and hold possession as a *special occupant* during the remainder of the term. By reason of the fact that the property might be without an owner, estates *pur autre vie* were in express terms made devisable by the Statute of Frauds, 29 Charles II, ch. 3, sec. 12, and if not so disposed of, the heir took the estate as a *special occupant* and was chargeable with the same as assets of the decedent for the payment of his debts. By the statute of 14 George II, ch. 20, sec. 9, which explained the former enactment, it was provided that in the event of intestacy and no special occupant having been named, the estate was deemed personal estate and subject to administration as such, the surplus, however, after the payment of debts, being distributed to the next of kin.⁷⁸ By the statute of 1 Vict., ch. 26, sec. 2, the previous enactments regarding estates *pur autre vie* were repealed, but by section 3 it was enacted that the right to devise, bequeath or dispose by will of all real estate and all personal estate which the testator might be entitled to, either at law or in equity, at the time of his death, extended "also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or incorporeal hereditament." Sec-

⁷⁸ Coke, Litt. (1st Am. Ed.) Lib. *258, *259, *260; 4 Kent Com. *26, 1, ch. 6, § 56, p. 41b; 2 Bl. Com. *27.

tion 6 of the same statute further enacted, "That if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of an estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go to be applied and distributed in the same manner as the personal estate of the testator or intestate." An estate *pur autre vie*, therefore, although in the nature of a freehold, in many respects, as to administration for instance, partakes of the nature of personalty. It is not an estate of inheritance since the heir does not take by descent.⁷⁹

The provisions of the Statute of Frauds regarding estates *pur autre vie* have been substantially re-enacted in many of the jurisdictions in the United States, but some differences occur as to the nature of the interest after the death of the tenant *pur autre vie*, some jurisdictions holding such interest to be a chattel real, others holding it to be descendible as would be an estate in fee simple. In those jurisdictions where estates *pur autre vie* are not made devisable by special enactment, they may be devised under the general power to make a testamen-

⁷⁹ Doe d. Blake v. Luxton, 6 T. R. 289.

tary disposition of legal and equitable interests in real and personal property.

§ 247. Right in Equity to Cancel Deed Is Devisable.

A deed to lands, obtained by fraud, duress or undue influence, even though duly recorded and the grantee has taken possession thereunder, does not work such a disseisin as will prevent the grantor from thereafter making a devise of his interest in the property. He has the right in equity to have such deed set aside and the grantee will be considered as trustee for the grantor and a re-conveyance may be decreed. A devisee of a deceased grantor could obtain the same relief in equity as the testator might have had.⁸⁰

§ 248. Life Estates and Joint Tenancies: Not Devisable.

Where the interest which a testator has in property ceases with his life, there being no estate remaining to descend to his heirs, nothing remains which is subject to his testamentary disposition; therefore a life estate can not be devised.⁸¹

Joint tenants of real property hold the same interest therein through the same conveyance, their interest accruing at the same time; but upon the death of one joint tenant, his interest goes to the survivor or survivors, the heirs of the decedent acquiring no interest. Although a joint tenant might, during his life time, alienate his inter-

⁸⁰ Uppington v. Bullen, 2 D. & War. 184; Stump v. Gaby, 2 De Gex, M. & G. 623; Gresley v. Mousley, 4 De G. & J. 78; Smithwick v. Jordan, 15 Mass. 113; Poor v. Robinson, 10 Mass. 131.

⁸¹ Berry v. Heiser, 271 Ill. 264, 111 N. E. 99; Young v. Snow, 167 Mass. 287, 45 N. E. 686; Studdard v. Wells, 120 Mo. 25, 25 S. W. 201.

est in property,⁸² or mortgage the same,⁸³ and thus defeat the rights of the survivor, yet if there has been no severance of the estate during the life of a joint tenant, upon his death the right of the survivor immediately accrues and there remains no interest in the estate of the decedent which can pass under his will or descend to his heirs.⁸⁴ A statute which provides that any person may devise any interest descendible to his heirs which he may have in lands, does not empower him to devise his interest in a joint estate.⁸⁵ This refers to the case where the testator who attempts to dispose of his interest in a joint estate by will, dies before the other joint tenant; his interest passes to the survivor and there is nothing for him to devise. The will, however, is not invalid, and should one of two joint tenants make a devise of the real property and thereafter, by reason of the death of the other, acquire the entire estate therein, since it is now lawful to devise real property acquired subsequent to the execution of a will, the lands would pass to the devisee. Joint tenancy, however, is not favored in the United States and has been abolished by statute in many jurisdictions; in others an instrument is not construed as creating a joint tenancy unless it specifically so provides, the grantees taking merely as tenants in common.⁸⁶

⁸² *Bevins v. Cline's Admr.*, 21 Ind. 37, 40; *Duncan v. Forrer*, 6 Bin. (Pa.) 193.

⁸³ *York v. Stone*, 1 Salk. 158; *Simpson's Lessee v. Ammons*, 1 Bin. (Pa.) 175, 2 Am. Dec. 425.

⁸⁴ 4 Kent Com. *360; *Chaplin v. Leapley*, 35 Ind. App. 511, 74 N. E.

546; *Wilkins v. Young*, 144 Ind. 1, 55 Am. St. Rep. 162, 41 N. E. 68, 590.

⁸⁵ *Wilkins v. Young*, 144 Ind. 1, 55 Am. St. Rep. 162, 41 N. E. 68, 590.

⁸⁶ 4 Kent. Com. *361, *362.

§ 249. Estate by the Entirety; Not Devisable.

The estate by the entirety of a husband and wife is inseverable; it can not be partitioned, and although the husband is entitled to control and manage the property, yet he can not dispose of it or encumber it in any way without the consent of his wife. The husband and wife have neither a joint estate nor a sole or several estate, nor even an estate in common. Because of their union in marriage they have an estate as one individual and upon the death of one the entire estate belongs to the survivor, not as an heir, but because the estate of the one first dying is extinguished. During their joint lives, the right of each extends to the whole property, and upon the death of one the right of the survivor includes the entire estate in the property under the instrument creating the estate by the entirety.⁸⁷ Such an estate is therefore not devisable.

§ 250. Estates in Coparcenary and Tenancies in Common May Be Devised.

An estate in coparcenary resembles a joint tenancy in that the coparceners, like joint tenants, acquire their in-

⁸⁷ 2 Bl. Com. *182; 2 Kent Com. *132, *133; Chaplin v. Leapley, 35 Ind. App. 511, 74 N. E. 546; Carver v. Smith, 90 Ind. 222, 46 Am. Rep. 210; Almond v. Bonnell, 76 Ill. 536; In re Robinson's Appeal, 88 Me. 17, 51 Am. St. Rep. 367, 30 L. R. A. 331, 33 Atl. 652; Fladung v. Rose, 58 Md. 13; See v. Zabriskie, 28 N. J. Eq. 422; Rogers v. Benson, 5 Johns. Ch. (N. Y.) 431; Torrey v. Torrey, 14 N. Y. 430; French v. Mehan, 56 Pa. St. 286; Corinth

v. Emery, 63 Vt. 505, 25 Am. St. Rep. 780, 22 Atl. 618.

Estates by the entireties were never recognized in Connecticut and Ohio.—Whittlesey v. Fuller, 11 Conn. 337; Sergeant v. Steinberger, 2 Ohio 305, 15 Am. Dec. 553.

Estates by the entireties have, in some jurisdictions, been abolished, either directly or indirectly.—Walthall v. Goree, 36 Ala. 728; Hoffman v. Stigers, 28 Iowa 302;

terest at one time and from the same source—coparceners acquire their title by descent—and there is unity of interest and possession. Each coparcener, however, has a distinct estate and may alienate or devise his share. Such an estate resembles that of a tenancy in common in that the doctrine of survivorship does not obtain, and upon the death of a coparcener intestate his share descends to his heirs.⁸⁸ Such estates, however, are not favored in the United States, and in practically all of the states those deriving title to real property by descent are deemed tenants in common.⁸⁹

In a tenancy in common there is unity of possession, but each tenant has a separate and distinct title or interest in the property which he may dispose of during his life time or devise at his death the same as if it were a separate estate, or, dying intestate, it descends to his heirs.⁹⁰

§ 251. Community Property and Rights of Dower, Curtesy and Homestead.

In practically all jurisdictions, a surviving husband or wife has an interest, fixed by statute, in the property of the other or in the property acquired during marriage. The estates of dower and of curtesy are well known. In

Cooper v. Cooper, 76 Ill. 57; Clark v. Clark, 56 N. H. 105.

⁸⁸ 2 Bl. Com. *187, *188; 4 Kent Com. *366.

⁸⁹ 4 Kent Com. *367; Stimson's Am. St. Law, §§ 1375, 1376, 3130; Hoffar v. Dement, 5 Gill (Md.) 132, 46 Am. Dec. 628; Gilpin v. Hollingsworth, 3 Md. 190, 56 Am. Dec. 737; Palms v. Palms, 68 Mich. 355, 36 N. W. 419; Bishop v. Mc-

Clelland's Exrs., 44 N. J. Eq. 450, 1 L. R. A. 551, 16 Atl. 1; Rowland v. Murphy, 66 Tex. 534, 1 S. W. 658.

⁹⁰ 4 Kent Com. *367, *368; 1 Washburn Real Prop. 652, 653. See, also, Brown v. Wellington, 106 Mass. 318, 8 Am. Rep. 330; Bush v. Gamble, 127 Pa. St. 43, 17 Atl. 865.

some of the southern and western states, the law of community property prevails, having been adopted from the civil law prior to such sections becoming a portion of the United States. Community property includes all property, real and personal, acquired during marriage, excluding, however, property acquired by either gift, devise, bequest or descent which, with the property owned by either prior to marriage and the rents, issues and profits thereof, is denominated separate property. Then again, in many states, a widow and minor children have by statute, upon the death of the husband and father, the right to have the homestead and household effects set apart for their use and occupation.

§ 252. The Same Subject: Neither Husband Nor Wife Can Be Deprived of Their Statutory Rights.

Where the statute gives a husband or a wife certain rights in the property of the other after his or her death, the one first dying can not bequeath or devise such portion and thus defeat the statutory rights of the other.⁹¹ Thus, under the laws of California, one-half of the community property goes to the wife upon the death of the husband and this portion is not subject to his testamentary disposition should she survive him.⁹² Nor can a husband, he dying first, dispose by will of the dower rights of his wife, nor other articles which the statute

⁹¹ *Canaday v. Baysinger*, 170 Iowa 414, 152 N. W. 562; *State v. Cline*, 91 Kan. 416, 50 L. R. A. (N. S.) 991, 137 Pac. 932; *Gaster v. Estate of Gaster*, 92 Neb. 6, 137 N. W. 900.

⁹² *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125; *Scott v. Ward*,

13 Cal. 458; *Estate of Silvey*, 42 Cal. 210; *Estate of Gwin*, 77 Cal. 313, 19 Pac. 527; *Estate of Whitney*, 171 Cal. 750, 154 Pac. 855. To the same effect: *Walker v. Howard*, 34 Tex. 478; *Mayo v. Tudor's Heirs*, 74 Tex. 471, 12 S. W. 117.

may specially provide are to go to her;⁹³ and a homestead will be set apart to those entitled thereto by statute, although otherwise devised.⁹⁴ ✓

§ 253. The Same Subject: Effect of Consent or Election to Take Under the Will.

Statutes limiting the right of a husband or wife in disposing of the property of their union generally provide that the restriction may be waived by obtaining the consent of the other in writing. Such consent by one gives the other the right to dispose of his or her interest in the property of their union, but its effect is merely that the one so consenting elects to take under the will in lieu of any rights which he or she might be given by the statute; it in nowise affects the validity of the will.⁹⁵ In

⁹³ *Hasenritter v. Hasenritter*, 77 Mo. 162.

⁹⁴ *Bell v. Bell*, 84 Ala. 64, 4 So. 189; *Pratt v. Pratt*, 161 Mass. 276, 37 N. E. 435.

Where a man, prior to his marriage, enters into an agreement with his intended wife to pay her a certain sum annually, if he gives his executors under his will an unlimited power to sell and use the property of his estate as they may deem advisable, any illegal or improper investments may be restrained, since the rights of creditors are superior to the rights conferred by will on the executors. — *Appeal of Bannan*, 1 Walk. (Pa.) 1.

⁹⁵ *In re Whitney's Estate*, 171 Cal. 750, 154 Pac. 855; *Durkee v. Smith*, 90 Misc. Rep. 92, 153 N. Y. Supp. 316; *Hughes v. Stouten-*

burgh, 168 App. Div. 512, 154 N. Y. Supp. 65; *Bacus v. Burns*, (Okla.) 149 Pac. 1115.

In *Estate of Whitney*, 171 Cal. 750, 154 Pac. 855, the wife signed the following waiver: "I hereby elect to accept and acquiesce in the provisions of said will, and hereby waive all claims to my share of any community property, and any and all other claims that I may have upon any of the estate disposed of by said will." It was held that although the wife's election to take under the will, and the general words of the waiver, taken by themselves, were sufficient to cut her off from a family allowance, yet the court would consider the circumstance that the husband and wife were negotiating with regard to her community rights and did not have

the absence of such consent, the husband or wife may refuse to accept any devise or legacy under the will, and take the property given them by statute.⁹⁶ Thus, where the law gave the widow a one-third in value of the legal or equitable estate which her husband may have possessed at any time during their marriage, the husband has no right to dispose of the same by will, and if he attempts to do so, his widow may renounce any provisions made by the will in her favor, and elect to take her share of the estate as directed by statute, or she may relinquish her statutory rights and take under the will. She must make her election, consent not having been previously given, either to take under the will or under the statute. The will is valid, however, even if the widow renounces the provisions in her favor, in so far as it distributes the remainder of the property to other legatees and devisees.⁹⁷

in mind her possible application for a family allowance, and that therefore her application for such allowance should be allowed.

In *re Cutting*, 174 Cal. —, 161 Pac. 1137, the decedent made an ante-nuptial agreement with his intended wife wherein she agreed, in consideration of a fixed sum to be paid her during life, to accept the same "in lieu of any and all claims against the property of said F. C., whether community or any other property or interest." The court held that the widow was entitled to receive the stipu-

lated sum during her life, out of the assets of the estate, and that it was in lieu of family allowance as well as any other possible demands against the property.

⁹⁶ *Gaster v. Estate of Gaster*, 92 Neb. 6, 137 N. W. 900; *Estate of Strahan*, 93 Neb. 828, 142 N. W. 678; *Richardson v. Johnson*, 97 Neb. 749, 151 N. W. 314.

⁹⁷ *Gullett v. Farley*, 164 Ill. 566, 45 N. E. 972; *In re Davis's Estate*, 36 Iowa 24; *Smith v. Baldwin*, 2 Ind. 404; *In re Little*, 22 Utah 204, 61 Pac. 899.

§ 254. The Same Subject: Consent, When Once Given, Can Not Be Revoked.

Where the statute provides that a husband or wife may bequeath or devise property which by law would go to the survivor upon the death of the other, upon obtaining the consent in writing to that effect, and the statute contains no provision for the revocation of such consent, such consent freely and fairly given allows the other to make a testamentary disposition of the share so legally surrendered. Unless the consent stipulates otherwise, it is not necessary that the party giving the consent should receive anything under the will of the other.⁹⁸ Such consent, however, if obtained by fraud or imposition, could be set aside,⁹⁹ but the general rule is that an election, when once made, can not thereafter be revoked.¹

§ 255. Chattels Real: May Be Bequeathed.

Chattels real are personal interests in real property, or annexed thereto, being lands and freehold, as a lease of lands for years the period of which is fixed and determined, irrespective of its duration even though it should be a thousand years.² Chattels real are considered as personalty and do not descend, like lands, to the heir,

⁹⁸ Keeler v. Lauer, 73 Kan. 388, 396, 85 Pac. 541; Hanson v. Hanson, 81 Kan. 305, 105 Pac. 444; Chilson v. Rogers, 91 Kan. 426, 137 Pac. 936.

⁹⁹ Weisner v. Weisner, 89 Kan. 352, 131 Pac. 608.

¹ Ellis v. Lewis, 3 Hare 313; Bennett v. Packer, 70 Conn. 357, 66 Am. St. Rep. 112, 39 Atl. 739; Stilwell v. Knapper, 69 Ind. 558, 35 Am. Rep. 240; O'Harrow v.

Whitney, 85 Ind. 140; McGuire v. Brown, 41 Iowa 650; Reville v. Dubach, 60 Kan. 572, 57 Pac. 522; Ashelford v. Chapman, 81 Kan. 312, 105 Pac. 534; Church v. Bull, 2 Denio (N. Y.) 430, 43 Am. Dec. 754; Cunningham v. Shannon, 4 Rich. Eq. (S. C.) 135.

² Coke, Litt. (1st Am. Ed.) Lib. 1, ch. 7, § 58, p. 46a; Case of Gay, 5 Mass. 419; Brewster v. Hill, 1 N. H. 350.

but pass to the executor or administrator and are subject to administration and the claims of creditors.³ Such interests may be bequeathed the same as personalty.

§ 256. Interests of Mortgagor and Mortgagee: How Considered.

A mortgage, according to the old common law theory, was a conveyance of a defeasible state in land to the mortgagee, subject to be defeated by a condition subsequent, namely, the liquidation of the debt or the fulfillment of the obligation for which the mortgage was given. If the mortgagor failed to meet the condition, the absolute estate then vested in the mortgagee.⁴ On account of the hardships resulting from this rule, the Court of Chancery finally acquired jurisdiction of mortgages and decreed that a mortgagor might redeem the estate after condition broken, by the payment of the debt with interest.⁵ In equity, therefore, a mortgage was merely a lien upon the property and not the conveyance of the legal estate.⁶ It was therefore held, in equity, that the mortgagee merely had a claim for the amount due him, and as the land was merely security for the debt, the interest of the mortgagee in the mortgage was considered personal property and upon his demise became a part of his estate

³ Coke, Litt. (1st Am. Ed.) Lib. 2, ch. 2, § 177, p. 118b; 2 Bl. Com. *386; *Schee v. Wiseman*, 79 Ind. 389; *Ellis v. Wren*, 84 Ky. 254, 1 S. W. 440; *In re Hirst's Estate*, 147 Pa. St. 319, 23 Atl. 455; *Becker v. Walworth*, 45 Ohio St. 169, 12 N. E. 1.

⁴ 4 Kent Com. *140, *141; *Goodall's Case*, Coke's Rep., pt. 5, 95b; *Wade's Case*, Coke's Rep., pt. 5, I Com. on Wills—20

114a; *Fay v. Cheney*, 14 Pick. (Mass.) 399.

⁵ *Casborne v. Scarfe*, 1 Atk. 603; *Willett v. Winnell*, 1 Vern. 488; *Amburst v. Dawling*, 2 Vern. 401; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. Ed. 93, 16 Sup. Ct. 1042.

⁶ 4 Kent Com. *142; *Matthews v. Wallwyn*, 4 Ves. Jun. 118; *Hughes v. Edwards*, 9 Wheat. (U. S.) 489, 500, 6 L. Ed. 142, 145; *Jackson v.*

and did not descend to his heir.⁷ Equity considered the mortgagor the owner of the land, although encumbered with a lien in favor of the mortgagee, and the mortgagor's equity of redemption was considered an equitable estate in the land.⁸

As has been shown, under the old common law rule the mortgagee acquired a legal estate in the mortgaged property which descended to his heirs.⁹ However, after equity assumed jurisdiction of mortgages, the mortgage was considered merely as personal property and therefore passed to the personal representatives. The mortgage itself is now considered to be personalty even in those jurisdictions where some of the remnants of the common law prevail.¹⁰ The modern rule is that the interest of a mortgagee in a mortgage, prior to foreclosure, is a personal interest only which would pass to his personal representatives at his death, and could be bequeathed by a special, general or residuary legacy.¹¹ There are two kinds of foreclosures recognized, strict, and equitable. Under strict foreclosure, the legal title becomes vested in the mortgagee and would descend to his heirs.¹² Under equitable foreclosure the mortgagor

Willard, 4 Johns. (N. Y.) 41; Whitney v. French, 25 Vt. 663.

⁷ Thornborough v. Baker, 3 Swanst. 628.

⁸ Casborne v. Scarfe, 1 Atk. 603.

⁹ Coke, Litt. Lib. 3, ch. 5, § 332, p. 205a; Bradley v. Lightcap, 195 U. S. 1, 2, 49 L. Ed. 65, 24 Sup. Ct. 748.

¹⁰ Douglass v. Durin, 51 Me. 121; Taft v. Stevens, 3 Gray (Mass.) 504; Jackson v. Delancey, 11 Johns. (N. Y.) 365; White v. Rittenmyer,

30 Iowa 268, 272; Haskins v. Hawkes, 108 Mass. 379.

¹¹ Thornborough v. Baker, 3 Swanst. 628; Tabor v. Tabor, 3 Swanst. 636; Chase v. Lockerman, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277; Fay v. Cheney, 14 Pick. (Mass.) 399; Jackson v. De Lancy, 13 Johns. (N. Y.) 535; Moore v. Cornell, 68 Pa. St. 320.

¹² Goodman v. White, 26 Conn. 317, 322; Farrell v. Parlier, 50 Ill. 274; Osborne v. Tunis, 25 N. J. L.

has a certain time within which to redeem, either fixed by statute or in the decree of foreclosure, designated generally as the equity of redemption. The deed to the property sold in a suit in equity to foreclose the mortgage, does not pass to the purchaser until the expiration of the period of redemption. The interest of the mortgagor under the modern theory is, prior to foreclosure, a legal estate in land which would descend to his heirs; and even though the legal estate may have been wiped out by foreclosure, yet so long as the mortgagor has the equitable right of redemption, although it is not real estate, it is now regarded as having the qualities of a legal estate and will descend to the heir or pass to the devisee of the deceased mortgagor.¹³

§ 257. Choses in Action and Other Personal Property.

Personal property does not descend to the heir at law of a decedent, but becomes a part of his estate for the purposes of administration and distribution. The old rule as to the non-devisability of after-acquired real property never pertained to personalty.¹⁴ Upon the death of a decedent his personal property passes into the hands of his executor or administrator. This includes choses in action which it is the duty of the administrator or executor to collect and adjust. All personal property,

633; *Kendall v. Treadwell*, 14 How. Pr. (N. Y.) 165.

¹³ *Howard v. Harris*, 1 Vern. 190; *Seton v. Slade*, 7 Ves. Jun. 265; *Casborne v. Scarfe*, 1 Atk. 603; *Dunning v. Ocean Natl. Bank*, 61 N. Y. 497, 19 Am. Rep. 293; *Clark v. Seagraves*, 186 Mass. 430, 71 N. E. 813; *Wambold v. Scholl*, 12 Montreal L. R. 173.

¹⁴ *Smith v. Edrington*, 8 Cranch (U. S.) 66, 3 L. Ed. 490; *Marshall's Heirs v. Porter*, 10 B. Mon. (49 Ky.) 1; *Haven v. Foster*, 14 Pick. (Mass.) 534, 539; *Wait v. Belding*, 24 Pick. (Mass.) 129; *McNaughton v. McNaughton*, 34 N. Y. 201; *Nichols v. Allen*, 87 Tenn. 131, 9 S. W. 430.

including choses in action, may be bequeathed, possession in the testator not being essential.¹⁵ It is the right and duty of the executor or administrator to enforce the contractual obligations due to the decedent,¹⁶ but if there has been a bequest of some chose in action or some article of personal property to a specific legatee, such legatee may, with the consent of the executor or administrator, sue for and recover the same; but in the absence of a specific bequest of the right of action or without consent therefor having been given by the executor or administrator, the legatee of a chose in action has no right, in his own name, to enforce the obligation, except in those jurisdictions where such right is given by the statute.¹⁷ And as to personal property acquired by a testator subsequent to the execution of his will, it is presumed that he intended all such property to pass where he makes a general or residuary bequest of such property or the remainder thereof, but if an intention to the contrary is clearly shown, such intention prevails.¹⁸

¹⁵ *Puryear v. Beard*, 14 Ala. 121; *Smith v. Townes's Admr.*, 4 Munf. (Va.) 191.

¹⁶ *Smith v. Townes' Admr.*, 4 Munf. (Va.) 191.

¹⁷ *Hayes v. Hayes*, 45 N. J. Eq. 461, 17 Atl. 634.

¹⁸ *Van Vechten v. Van Veghten*, 8 Paige (N. Y.) 104.

Where a statute provided that "all persons over the age of eighteen years by their last will and testament may dispose of their personal property," the will of a person between the ages of

eighteen and twenty-one disposing of his interest in property which had been devised by his father to his mother for the term of her natural life and at her death to be sold and the proceeds to be divided equally among their children, was held valid although his mother did not die until some thirty years after the death of the son making the will. The interest was vested in the testator, only the time of enjoyment being postponed.—*Allen v. Watts*, 98 Ala. 384, 11 So. 646.

§ 258. Benefits Arising From a Policy of Life Insurance: Distinguishing Features.

The benefits to be derived from a policy of insurance issued upon the life of the testator and payable to him, his administrators, executors or assigns, may be disposed of by will.¹⁹ This rule holds good even though there is a statutory provision that moneys derived from a policy of life insurance shall not become a part of the estate of the insured upon his demise, for the payment of his debts, but shall go to his wife and children.²⁰

There is a clear distinction in the authorities between policies of insurance payable to a designated beneficiary, and those made payable to the executors or administrators of the assured.²¹ Fine distinctions are sometimes drawn regarding the terms by which the beneficiaries are

¹⁹ *Stoelker v. Thornton*, 88 Ala. 241, 6 L. R. A. 140, 6 So. 680; *Blouin v. Phaneuf*, 81 Me. 176, 178, 16 Atl. 540; *Fox v. Senter*, 83 Me. 295, 22 Atl. 173; *Golder v. Chandler*, 87 Me. 63, 32 Atl. 784; *Aveling v. Northwestern Masonic Aid Assn.*, 72 Mich. 7, 1 L. R. A. 528, 40 N. W. 28; *Sherman v. Howes*, (R. I.) 97 Atl. 16; *Williams v. Carson*, 9 Baxt. (68 Tenn.) 516; *Catholic Knights of America v. Kuhn*, 91 Tenn. 214, 18 S. W. 385.

A bequest made by a decedent to his widow of ten thousand dollars to be realized out of the proceeds of such insurance as was in force on his life at the time of his death, was limited to such amount although such insurance exceeded ten thousand dollars and the widow was named as bene-

ficiary in one policy for part of the amount. The portion received directly as a beneficiary was counted as a part of the ten thousand.—*Kramer v. Lyle*, 197 Fed. 618.

A policy of fire insurance held by a decedent at the time of his death on property then owned by him, passes to the heir or devisee of the property, and should loss occur, the heir or devisee can collect the insurance.—*Grant v. Eliot and Kittery Mutual Fire Ins. Co.*, 75 Me. 196; *Wyman v. Prosser*, 36 Barb. (N. Y.) 368; *Wyman v. Wyman*, 26 N. Y. 253.

²⁰ *Hamilton v. McQuillan*, 82 Me. 204, 19 Atl. 167; *Fox v. Senter*, 83 Me. 295, 22 Atl. 173.

²¹ *Fletcher v. Williams*, (Tex. Civ. App.) 66 S. W. 860.

designated; thus, where a beneficiary certificate of an order provided that it was to be paid to the "legal representatives" of a member, it was held that a residuary legacy in the will of a deceased member caused the benefits to pass to the legatee.²² Yet where a policy of insurance was payable to the "legal heirs" of the insured, unless otherwise directed by will, it was held that the benefits passed to such "legal heirs" as designated in the policy, and did not become a part of the estate of the decedent. In the instance last mentioned, although the testator had a right to direct by will to whom the benefits should pass, yet the direction in his testament, after having made certain dispositions, that the balance of his "property of all kinds" should be divided between his brother and sister, was held not to be the appointment of a beneficiary.²³

A distinction has also been made between a case where the interest of one is in an insurance policy on the life of another, in which instance any general residuary legacy, without specially designating the interest, would carry the benefits, and one where the policy is on his own life, in which case the testator must particularly express his

²² Walker v. Peters, 139 Mo. App. 681, 124 S. W. 35.

A policy of insurance, payable at death to the insured, his executors, administrators and assigns, for the benefit of the wife, if any, of the insured, can properly be collected, after the death of the insured and there having been no assignment, only by the executor or administrator of his estate, and it would be general assets in their hands, liable to the payment of debts.—Burroughs v. State Mut.

Life Assur. Co., 97 Mass. 359; Bailey v. New England Mutual Life Insurance Co., 114 Mass. 177, 19 Am. Rep. 329.

Note—In many states, the benefits received from a policy of insurance on the life of the deceased and made payable to his estate, are, to a fixed sum, varying in the different jurisdictions, exempt from execution and the payment of claims against the estate.

²³ Graham v. Allison, 24 Mo. App. 516.

intentions, since in such cases the statutes, generally, make special provision for the distribution of the money.²⁴

§ 259. The Same Subject: When Payable to the Estate of the Insured, for the Benefit of His Wife and Children.

Where a policy of life insurance is made payable, upon the death of the insured, to his executors, administrators and assigns "for the benefit of his widow, if any, and his then surviving child or children," the rights of the widow and children are fixed by the policy. Their rights can not be affected by the will of the deceased or disposed of in that manner;²⁵ and the fact that the wife had died before the insured would not pass her interest into his estate so as to allow him to dispose of it by will.²⁶ The interest of a wife in a policy of insurance on the life of her husband, taken out by him for her benefit, and in the event of her death before his, then for their children, does not become community property. Such a policy is for her separate use and the benefits thereof do not accrue until after his death. Should she die before her husband, under the provisions above mentioned the children of their union would receive the proceeds.²⁷ But if at the death of the wife there are no children, the benefits under the policy will pass under a bequest of the same in the

²⁴ *Hathaway v. Sherman*, 61 Me. 466; *Small v. Jose*, 86 Me. 120, 29 Atl. 976.

²⁵ *Gould v. Emerson*, 99 Mass. 154, 96 Am. Dec. 720.

In *Olmstead v. Masonic Mutual Benefit Soc.*, 37 Kan. 93, 14 Pac. 449, it was held that where a person who had insured his life for the benefit of his wife or her legal representatives, after her de-

cease failed to take the necessary steps to appoint a beneficiary in her place, but attempted to dispose of the interest in the policy by will, the heirs of the deceased wife were entitled to recover.

²⁶ *Small v. Jose*, 86 Me. 120, 29 Atl. 976.

²⁷ *Evans v. Opperman*, 76 Tex. 293, 13 S. W. 312.

husband's will, notwithstanding the wife may have made a devise of her alleged interest to another.²⁸

§ 260. The Same Subject: When Payable to a Specified Beneficiary.

An insurance policy taken out by one on his own life for the benefit of some specified beneficiary, with the full understanding between the insured and the beneficiary that it is taken out for such purpose, constitutes a valid settlement and nothing remains to complete it. It is a good trust. Although the insured may not have agreed to pay the future premiums and can not be compelled to do so, yet he can not change the beneficiary, by will or otherwise, without the consent of the one first designated as such.²⁹

§ 261. Benefits Accruing From Membership in Mutual Benefit Societies.

The benefits derived from membership in a mutual benefit organization depend largely upon its constitution

²⁸ *Harvey v. Van Cott*, 71 Hun 394, 25 N. Y. Supp. 25.

Where the decedent had made a post-nuptial of three insurance policies in trust for his wife for life and after her death to his appointees, and in default of such appointment, in trust for the children of their marriage, the wife dying and leaving children of their union, it was held upon the death of the insured (the husband) that the fund became part of his estate and liable for the payment of his debts, and for distribution.—*MacKenzie v. Mackenzie*, 3 MacN. & G. 559.

²⁹ *Weston v. Richardson*, 47 L. T. (N. S.) 514; *Chapin v. Fellowes*, 36 Conn. 132, 4 Am. Rep. 49; *Lemon v. Phoenix Mut. Life Ins. Co.*, 38 Conn. 294; *Wilburn v. Wilburn*, 83 Ind. 55; *Weisert v. Muehl*, 81 Ky. 336; *National Life Ins. Co. v. Haley*, 78 Me. 268, 57 Am. Rep. 807, 4 Atl. 415; *Pingrey v. National Life Ins. Co.*, 144 Mass. 374, 11 N. E. 562; *Ricker v. Charter Oak L. Ins. Co.*, 27 Minn. 193, 38 Am. Rep. 289, 6 N. W. 771; *Barry v. Brune*, 71 N. Y. 261, 268; *Manhattan Life Ins. Co. v. Smith*, 44 Ohio St. 156, 58 Am. Rep. 806, 5 N. E. 417.

and rules. If the by-laws provide for benefits for the wife and children of members, and also that any brother has the right to bequeath such amount to other persons by having such designation inserted in a book kept by the lodge for that purpose, a member who fails to nominate his beneficiary in the manner stated, can not do so by making a bequest of such benefits in his will. The lodge only agrees to make payments to those designated in a certain manner, and if no one is so specified, no payments can be enforced.³⁰ Persons joining such societies agree, upon becoming members, to conform to the constitution and by-laws, and such agreement holds, even though the constitution and by-laws be amended. Where the rules provide for the designation of a beneficiary in a certain manner, and if none is named or if named, dies before the member, that the benefits shall go to certain relatives, the rules control, and the bequest of a deceased member would not pass the fund to the legatee. This is especially true where the laws of the society contain no provision for the changing of beneficiaries.³¹ In a California case the court went further and held that where a beneficiary had been named by a member, there remained nothing which was subject to his testamentary disposition, and that a will providing as follows: "I also give to my son Frank the money which will become due from said Uniao Portugeza de Estado," could not be con-

³⁰ Kentucky Masonic Mutual L. Ins. Co. v. Miller's Admrs., 13 Bush (76 Ky.) 489; Maryland Mutual Benevolent Soc. v. Clendinen, 44 Md. 429, 22 Am. Rep. 52; Richmond v. Johnson, 28 Minn. 447, 10 N. W. 596; Arthur v. Odd Fellows' Beneficial Assn., 29 Ohio St. 557; Durian v. Central Verein etc.,

7 Daly (N. Y.) 168; Greeno v. Greeno, 23 Hun (N. Y.) 478; Hellenberg v. District No. One of I. O. B. B., 94 N. Y. 580.

³¹ DeSilva v. Supreme Council, 109 Cal. 373, 42 Pac. 32; Masonic Mutual Benefit Assoc. v. Severson, 71 Conn. 719, 43 Atl. 192.

sidered as a substitution or as a revocation of beneficiaries, and passed nothing.³² Yet where a member of a mutual benefit society had designated his beneficiaries but had reserved the right to change them, and later had made his will wherein he revoked his former action and directed that the benefits be divided in a specified manner, such directions controlled in so far as they named the beneficiaries, but the fund did not become a part of the estate of the decedent.³³

§ 262. Claims Against the Government: When They May Be Bequeathed.

A claim against the government for supplies appropriated, is property; a claim for compensation for the use or appropriation of tangible property is personal property.³⁴ Such a claim, when paid by the government, is not a mere gratuity; if paid after the death of the claimant, it is a property right which will pass under a general residuary clause of the claimant's will, although he may have died many years previously.³⁵

³² *DeSilva v. Supreme Council*, 109 Cal. 373, 42 Pac. 32.

³³ *Catholic Ben. Assoc. v. Priest*, 46 Mich. 429, 9 N. W. 481.

³⁴ *Comegys v. Vasse*, 1 Pet. (U. S.) 193, 7 L. Ed. 108; *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065; *Phelps v. McDonald*, 99 U. S. 298, 25 L. Ed. 473; *Bachman v. Lawson*, 109 U. S. 659, 27 L. Ed. 1067, 3 Sup. Ct. 479; *Williams v. Heard*, 140 U. S. 529, 35 L. Ed. 550, 11 Sup. Ct. 885; *Grant v. Bodwell*, 78 Me. 460, 7 Atl. 12; *Leonard v. Nye*, 125 Mass. 455.

A claim for compensation against the government for supplies appropriated by soldiers in time of warfare may be bequeathed; it is not a mere gratuity, but extends to the heirs at law of the claimant.—*Camp v. Vaughan*, 119 Ga. 131, 46 S. E. 79.

³⁵ *Camp v. Vaughan*, 119 Ga. 131, 46 S. E. 79; *Pierce v. Stidworthy*, 79 Me. 234, 9 Atl. 617.

Compare: *Ware v. Trustees of Emory College*, 65 Ga. 283; *Dunlap v. Dunlap*, 74 Me. 402.

Where the statutes of the United States provide that certain claims shall, in the event of the death of the claimant, be paid to the widow or some designated relative, the statutes control and the claim can not be disposed of by the will of the claimant. Thus after the death of a pensioner, accrued pensions to the date of his death go to his widow, or children if she be dead, and can not be bequeathed.³⁶

§ 263. Limitations Upon Devises for Charitable Purposes.

Devises and legacies for charitable purposes may properly be regulated by statute. The law may limit the percentage of an estate which may be willed to charity, and any devise or bequest in excess of such amount is invalid.³⁷ In determining the amount or percentage, the estate is taken at its value at the time of the death of the testator, not including, however, the expenses of administration.³⁸ Where a will contains a devise in lieu of dower, if the widow does not consent to accept the provisions of the will in lieu of dower, the value of the widow's dower is to be deducted from the gross value of the estate in determining whether or not

³⁶ *In re Van Horn*, 5 N. J. L. J. 372.

In *Reed v. Reed*, 53 Me. 527, the right of a volunteer soldier to bequeath his claim for back pay and bounty was denied since the statute provided that his father was entitled to receive the same after his death.

In *Webb v. Meyers*, 64 Hun 11, 18 N. Y. Supp. 711, it was held that a member of the New York Stock Exchange could not, by will,

dispose of the moneys provided by its constitution to be paid to certain relatives of any member after his death.

³⁷ *Estate of Friedman*, 171 Cal. 431, 153 Pac. 918.

³⁸ *Hughes v. Stoutenburgh*, 168 App. Div. 512, 154 N. Y. Supp. 65; *In re Brooklyn Trust Co.*, 92 Misc. Rep. 695, 157 N. Y. Supp. 671; *In re Colburn's Estate*, 157 N. Y. Supp. 676.

the testator has disposed of, for charitable uses, an amount greater than the percentage allowed by law; but if she elects to accept the provisions of the will in lieu of her dower rights, then the dower is released as of the date of the testator's death and no deduction is made therefor from the estate of the husband.³⁹

The testator can not evade the statute by devising to designated persons certain property in excess of the amount which by law may be left to charity, absolutely, but with an understanding that the property will be used for charitable purposes.⁴⁰ And where the statute provides that such charitable devises or bequests shall be valid only if executed at least a specified time prior to the testator's death, any devise or bequest to charity made by the testator within a shorter time before his demise, is invalid.⁴¹

§ 264. No Property Rights in a Corpse: Right of Burial.

The general rule seems well established that, in the absence of a statute to the contrary, the body of a deceased testator will not pass under his will or become a part of his estate, the corpse not being property. In some cases it has been said that the next of kin have the right to the body, for the purpose of a proper burial, but the right of disposing of the body by will was not involved.⁴² "There

³⁹ *Lord v. Lord*, 44 Misc. Rep. 530, 90 N. Y. Supp. 143; *Hughes v. Stoutenburgh*, 168 App. Div. 512, 154 N. Y. Supp. 65.

⁴⁰ *Durkee v. Smith*, 171 App. Div. 72, 156 N. Y. Supp. 920.

⁴¹ *Estate of Budd*, 166 Cal. 286, 135 Pac. 1131; *Ely v. Ely*, 163 App. Div. 320, 148 N. Y. Supp. 691; In

re *Smith's Exr.*, 85 Misc. Rep. 636, 149 N. Y. Supp. 24.

⁴² *Durell v. Hayward*, 9 Gray (Mass.) 248, 249, 69 Am. Dec. 284; *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370, 14 L. R. A. 85, 50 N. W. 238; In re *Widening Beekman St.*, 4 Bradf. Surr. (N. Y.) 503; *Foley v. Phelps*, 1

can be no property in the dead body of a human being," therefore it not being property, a man can not dispose of his dead body by will.⁴³

App. Div. 551, 37 N. Y. Supp. 471; *Wynkoop v. Wynkoop*, 42 Pa. St. 293, 82 Am. Dec. 506; *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667.

A surviving husband or wife has the first right to bury the remains of the other.—*Durell v. Hayward*, 9 Gray (Mass.) 248, 69 Am. Dec. 284; *Hadsell v. Hadsell*, 3 Ohio C. D. 725, 7 Ohio Cir. Ct. Rep. 196; *Hackett v. Hackett*, 18 R. I. 155, 49 Am. St. Rep. 762, 19 L. R. A. 558, 26 Atl. 42.

The surviving husband or wife, or the next of kin, has the right to bury a corpse and to preserve

and protect the remains, which includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure.—*O'Donnell v. Slack*, 123 Cal. 285, 43 L. R. A. 388, 55 Pac. 906.

⁴³ *Williams v. Williams*, L. R. 20 Ch. Div. 659; *Regina v. Sharpe, Dea. & Bell*, C. C. 160; *In re Wong Yung Quy*, 2 Fed. 624, 6 Sawy. 442; *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. Rep. 330, 53 L. R. A. 221, 63 Pac. 170; *Guthrie v. Weaver*, 1 Mo. App. 136; *Griffith v. Charlotte etc. R. Co.*, 23 S. C. 25, 55 Am. Rep. 1.

CHAPTER XII.

THE LAW WHICH GOVERNS IN CASES OF CONFLICT.

- § 265. Scope of chapter.
- § 266. The term "domicile" defined.
- § 267. "Domicile" is a question of fact.
- § 268. Domicile of married women.
- § 269. Rights in real property are governed by the law of the *situs*.
- § 270. Succession to personal property is governed by the law of the domicile of the decedent.
- § 271. Devises of real property are controlled by the law of the *situs*.
- § 272. Intention of the testator: By which law governed.
- § 273. Bequests of personal property: General rule is that law of testator's last domicile controls.
- § 274. The same subject: Decisions to the contrary.
- § 275. Effect of a change of domicile by the testator subsequent to executing his will.
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- § 277. Statutory regulations as to foreign wills.
- § 278. Chattels real: Difference between English and American rule.
- § 279. English rule as to bequests of personalty: Statutory regulations.
- § 280. Power of appointment exercised by will.
- § 281. Recording certified record of the probate of a foreign will.
- § 282. Ancillary administration.
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- § 284. The same subject: Illustration of the general rule.

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- § 287. Taxes upon the right to acquire property by will or under the laws of succession.
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- § 293. The same subject: "Tangible or intangible" personal property.
- § 294. The same subject: Bonds and certificates of stock of corporations distinguished.
- § 295. The same subject: What is "property within the state?"
- § 296. The same subject: English rule.

§ 265. Scope of Chapter.

Real and personal property may pass to the heir at law and the next of kin of an intestate decedent under the laws of succession. A surviving husband or wife may have rights in the real property of which the other was seized during his or her lifetime, under the laws regulating estates by curtesy or of dower; or either survivor may have rights in all property acquired during coverture, under laws relative to community property, adopted from the French system and prevailing generally in the western and southern parts of the United States. Or a decedent may have left a will disposing of all his estate consisting of both real and personal property. The will may have been executed in one juris-

diction; the testator, when he made his will, may have been domiciled in a state or country other than that where it was executed; subsequently the testator may have changed his domicile and the laws of the various jurisdictions may also have been altered or modified; the real property and the personal property of the decedent, both before and at the time of his death, may have been physically located in several different jurisdictions. The question then is, to which jurisdiction are we to look for the law governing the passing of the property; and further, which law controls, that in effect when the will was made, or that existing at the time of the death of the testator or intestate decedent? And a charitable bequest may be valid in one state, but not in another. There is harmony, to an extent, among the decisions relative to general principles involved; but so many jurisdictions have introduced statutory regulations that apparent conflicts arise even as to general rules, and all decisions should be read in the light of legislative enactments. This is particularly true regarding taxes on the transfer of property by will or under the laws of succession.

§ 266. The Term "Domicile" Defined.

Property may be divided into its two general divisions: Real and personal, personal property, in some instances, being further distinguished as to tangible and intangible. Real property may be said to be immovable; personal property may be classified as movable. Real property, therefore, has a fixed *situs*, while personal property follows the person—*mobilia sequuntur personam*. The owner, however, of such personalty may

have his actual abode within one jurisdiction, but his domicile may be in another state or country.

By the term "domicile," in its ordinary acceptance, is meant the place where a person lives or has his home. In this sense, the locality where a person has his actual dwelling or temporary residence is sometimes called his domicile. The place of residence and domicile are generally the same, and the different terms are often used in decisions, and even in our statutes, as if they had the same meaning. In a strict legal sense, domicile and residence are not synonymous; one may have several places of residence, in the city, country and abroad, but he can have but one domicile.¹ That is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the *animus revertendi* or intention of returning. Temporary residence at a place does not constitute it one's domicile.²

¹ Matter of Newcomb's Estate, 192 N. Y. 238, 84 N. E. 950.

² Canfield v. Sullivan, 85 N. Y. 153.

The word "domicile" in its legal sense signifies a country or territory subject to one system of laws, and does not refer to any particular place within the country.—Story, Conflict of Laws, § 41 and note.

Domicile is not controlled by citizenship or nationality.—Brunel v. Brunel, L. R. 12 Eq. 298; Hamilton v. Dallas, 1 Ch. Div. 257.

In Re Steer, 3 H. & N. 594, an Englishman who resided for many

years in Hamburg and had been regularly constituted a burgher of that city to enable him to trade there, was held to have elected such place as his domicile, and that a declaration in his will that he had not renounced his domicile of origin as an Englishman was unavailing, it being impossible to have two domiciles at one time.

In Stanley v. Bernes, 3 Hagg. Ecc. 373, it was held that a British subject might acquire a domicile abroad and that his claim to be considered a British subject did not destroy his foreign domicile.

§ 267. "Domicile" Is a Question of Fact.

It is a general principle that, for the purposes of succession, every person must have a domicile somewhere. One can have but one domicile, and the domicile of origin³ is presumed to continue until it is proven that a new one has been acquired.⁴ Domicile is controlled by inten-

³ The domicile of origin, as to a legitimate child, is the domicile of the father.—*Udny v. Udny*, L. R. 1 H. L. Sc. 441; *Douglas v. Douglas*, L. R. 12 Eq. 617; *Firebrace v. Firebrace*, L. R. 4 Pro. Div. 63; *Pren-tiss v. Barton*, 1 Brock. (U. S.) 389, Fed. Cas. No. 11,384; *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196, 23 L. R. A. 665, 36 N. E. 628; *Blumenthal v. Tannenholz*, 31 N. J. Eq. 194; *Kennedy v. Ryall*, 67 N. Y. 379.

The domicile of origin, as to an illegitimate child, is the domicile of the mother.—*Udny v. Udny*, L. R. 1 H. L. Sc. 441; *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196, 23 L. R. A. 665, 36 N. E. 628; *Louisville etc. R. R. Co. v. Kimbrough*, 115 Ky. 512, 74 S. W. 229.

"Domicile of origin" is sometimes inaccurately designated as "domicile of birth," but the domicile of origin, being that of the father or the mother, as the case may be, may not be the place where the child is born.—*Winans v. Attorney-General*, (1904) A. C. 287.

When a minor child has been legally adopted he takes the domicile of his adopting parents.—

Woodward v. Woodward, 87 Tenn. 644, 11 S. W. 892.

As to an illegitimate child which has subsequently been legitimized by the marriage of his parents, his domicile of origin would be that of his father.—*McNicholl v. Ives*, 4 Ohio Dec. 75; *Monson v. Palmer*, 8 Allen (Mass.) 551.

The domicile of an infant during minority, follows and changes with that of his parents, or the one from whom he took the domicile of origin.—*Sharpe v. Crispin*, L. R. 1 P. & D. 611; *Marks v. Marks*, 75 Fed. 321; *Tsoi Sim v. U. S.*, 116 Fed. 920, 54 C. C. A. 154; *Kelly v. Garrett*, 67 Ala. 304, 307; *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196, 23 L. R. A. 665, 36 N. E. 628; *Jenkins v. Clark*, 71 Iowa 552, 32 N. W. 504; *Matter of Benton*, 92 Iowa 202, 54 Am. St. Rep. 546, 60 N. W. 614; *Vennard Succession*, 44 La. Ann. 1076, 11 So. 705; *Hart v. Lindsey*, 17 N. H. 235, 43 Am. Dec. 597; *Matter of Rice*, 7 Daly (N. Y.) 22; *School Directors v. James*, 2 Watts & S. (Pa.) 568, 37 Am. Dec. 525; *Allen v. Thomson*, 11 Humph. (Tenn.) 536, 54 Am. Dec. 55.

⁴ *Somerville v. Somerville*, 5

tion which may be shown by declarations and by the circumstances attending a residence.⁵ In order to acquire a new domicile there must be the intention to abandon the existing domicile.⁶ Some decisions have held that the

Ves. Jun. 750; Attorney-General v. Countess Blucher de Wahlstatt, 3 Hurl. & Colt. 374; Winans v. Attorney-General, (1904) A. C. 287; Ennis v. Smith, 14 How. (U. S.) 400, 14 L. Ed. 472; In re Grimes, 94 Fed. 800; State v. Hallett, 8 Ala. 159; Merrill's Heirs v. Morrissett, 76 Ala. 433; People v. Moir, 207 Ill. 180, 99 Am. St. Rep. 205, 69 N. E. 905; Lebanon v. Biggers, 117 Ky. 430, 78 S. W. 213; Simmons' Succession, 109 La. Ann. 1095, 34 So. 101; Chew v. Wilson, 93 Md. 196, 48 Atl. 708; Abington v. North Bridgewater, 23 Pick. (Mass.) 170; Hallet v. Bassett, 100 Mass. 167, 170; Phillips v. Boston, 183 Mass. 314, 67 N. E. 250; Matter of Russell's Estate, 64 N. J. Eq. 313, 53 Atl. 169; Graham v. Public Administrator, 4 Bradf. (N. Y.) 127, 128; Dupuy v. Seymour, 64 Barb. (N. Y.) 156; Dupuy v. Wurtz, 53 N. Y. 556; Harris v. Harris, 83 App. Div. (N. Y.) 123, 82 N. Y. Supp. 568; Price v. Price, 156 Pa. St. 617, 27 Atl. 291; Cross v. Everts, 28 Tex. 523.

⁵ Dupuy v. Seymour, 64 Barb. (N. Y.) 156.

⁶ Mitchell v. United States, 21 Wall. (U. S.) 350, 22 L. Ed. 584; Illinois Life Ins. Co. v. Shenehon, 109 Fed. 674; Murphy v. Hunt, 75 Ala. 438; Allgood v. Williams, 92

Ala. 551, 8 So. 722; Jain v. Bossen, 27 Colo. 423, 62 Pac. 194; New Haven First Nat. Bank v. Balcom, 35 Conn. 351; Cooper v. Beers, 143 Ill. 25, 33 N. E. 61; People v. Moir, 207 Ill. 180, 99 Am. St. Rep. 205, 69 N. E. 905; Ludlow v. Szold, 90 Iowa 175, 57 N. W. 676; Sanderson v. Ralston, 20 La. Ann. 312; Cobb v. Rice, 130 Mass. 231; Pickering v. Cambridge, 144 Mass. 244, 10 N. E. 827; Dickinson v. Brookline, 181 Mass. 195, 92 Am. St. Rep. 407, 63 N. E. 331; Clark v. Likens, 26 N. J. L. 207; Crawford v. Wilson, 4 Barb. (N. Y.) 504; Pfoutz v. Comford, 36 Pa. St. 420; Rockingham v. Springfield, 59 Vt. 521, 9 Atl. 241; Lindsay v. Murphy, 76 Va. 428.

Persons living abroad in the service of their country, such as ambassadors, ministers and consuls, and those serving abroad in the military or naval branch of their own country, do not lose their domicile by reason of absence because of such service.—Sharpe v. Crispin, L. R. 1 P. & D. 611; Yelverton v. Yelverton, 1 Sw. & Tr. 574, 6 Jur. (N. S.) 24; Udny v. Udny, L. R. 1 H. L. Sc. 460; Firebrace v. Firebrace, L. R. 4 Pro. Div. 63; Wheat v. Smith, 50 Ark. 266, 7 S. W. 161; Knowlton v. Knowlton, 155 Ill. 158, 39 N. E. 595; Brewer v. Linnaeus, 36

intention to do the one implies the intention to do the other; but in all cases the question of intention is treated as one of fact, to be determined according to the particular circumstances of each case.⁷

Me. 428; *Crawford v. Wilson*, 4 Barb. (N. Y.) 504.

⁷ *Moorhouse v. Lord*, 10 H. L. Cas. 284; *Jopp v. Wood*, 4 De G. J. & S. 616, 34 L. J. Eq. 212; *Douglas v. Douglas*, L. R. 12 Eq. 617, 647; *Udny v. Udny*, L. R. 1 Scotch App. 441; *Hodgson v. De Beauchesne*, 12 Moore P. C. C. 285, 328; *Munro v. Munro*, 7 Cl. & Fin. 877; *Collier v. Rivaz*, 2 Curt. 855; *Aikman v. Aikman*, 3 Macq. H. L. 855, 877; *Hallowell v. Saco*, 5 Greenl. (Me.) 143; *Ringgold v. Barley*, 5 Md. 186, 59 Am. Dec. 107.

In *Dupuy v. Wurtz*, 53 N. Y. 556, the court says:

"To effect a change of domicile for the purpose of succession there must be not only a change of residence, but an intention to abandon the former domicile, and acquire another as a sole domicile. There must be both residence in the alleged and adopted domicile and intention to adopt such place of residence as the sole domicile. Residence alone has no effect per se, though it may be most important, as a ground from which to infer intention. Length of residence will not alone effect the change. Intention alone will not do it, but the two taken together do constitute a change of domicile."

The rule laid down in *Moorhouse v. Lord*, 10 H. L. Cas. 283, 293, was approved in *Dupuy v. Wurtz*, supra, viz.: "Change of residence alone, however long continued, does not effect a change of domicile as regulating the testamentary acts of the individual. It may be, and is, strong evidence of an intention to change the domicile. But unless in addition to the residence there is an intention to change the domicile, no change of domicile is made."

"The question, what place is any person's domicile, or place of abode, is a question of fact. It is in most cases determinable by a few decisive facts." "In some cases where the facts show a more or less frequent or continued residence in two places, either of which would be conclusively considered the person's place of domicile but for the circumstances attending the other, the intent of the party to consider the one or the other his domicile will determine it. One rule is that the fact and intent must concur."—Opinion of the Supreme Court judges of Massachusetts, in reply to an interrogation of the House of Representatives. Supplement to 5 Metc. (Mass.) 587, 588, 589, et seq.

In *Matter of Newcomb's Estate*,

§ 268. Domicile of Married Women.

The rule is that a woman, by marriage, acquires the domicile of her husband, and thenceforth, until death or divorce, the domicile of both is the same.⁸ This rule ap-

192 N. Y. 238, 84 N. E. 950, the court says: "As domicile and residence are usually in the same place, they are frequently used, even in our statutes, as if they had the same meaning; but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality; but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place; while domicile requires bodily presence in that place, and also an intention to make it one's domicile. The existing domicile, whether of origin or selection, continues until a new one is acquired, and the burden of proof rests upon the party who alleges a change. . . . Mere change of residence, although continued for a long time, does not effect a change of domicile; while a change of residence, even for a short time, with the intention in good faith to change the domicile, has that effect."

Following the above rule, it was recently decided that a testator had retained his domicile in the state of New York under the facts proven as to his intention, not-

withstanding for many years he had resided in Paris, France.—*United States Trust Co. v. Hart*, 150 App. Div. 413, 135 N. Y. Supp. 81.

⁸ *Munro v. Munro*, 7 Cl. & Fin. 842; *Donegal v. Donegal*, 1 Add. Ecc. 19; *In re Daly's Settlement*, 25 Beav. 456; *Goulder v. Goulder*, (1892) P. 240; *Guest v. Guest*, 3 Ont. Rep. 344; *Magurn v. Magurn*, 11 Ont. App. 178; *Anderson v. Watts*, 138 U. S. 694, 34 L. Ed. 1078, 11 Sup. Ct. 449; *Talmadge's Admr. v. Talmadge*, 66 Ala. 199; *New Haven First Nat. Bank v. Balcom*, 35 Conn. 351; *Wingfield v. Rhea*, 73 Ga. 477; *Cooper v. Beers*, 143 Ill. 25, 33 N. E. 61; *Galvin v. Dailey*, 109 Iowa 332, 80 N. W. 420; *Modern Woodmen of America v. Hester*, 66 Kan. 129, 71 Pac. 279; *Boreing v. Boreing*, 114 Ky. 522, 71 S. W. 431; *Burlen v. Shannon*, 115 Mass. 438; *Watkins v. Watkins*, 135 Mass. 83; *Spaulding v. Steel*, 129 Mich. 237, 88 N. W. 627; *Isaacs v. Isaacs*, 71 Neb. 537, 99 N. W. 268; *Tracy v. Tracy*, 62 N. J. Eq. 807, 48 Atl. 533; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Harris v. Harris*, 83 App. Div. (N. Y.) 123, 82 N. Y. Supp. 568; *Hammond v. Hammond*, 103 App. Div. (N. Y.) 437, 93 N. Y. Supp. 1; *Moore v. Moore*, 130 N. C. 333, 41 S. E. 943;

plies even though the husband and wife may actually reside in separate abodes.⁹ One exception to the rule, however, is that the wife, for the purpose of divorce, may acquire a separate residence or domicile from that of her husband.¹⁰ After the death of her husband, the widow retains his domicile until she acquires a new one, and in the event of a divorce, as to the woman, the situation is the same.

§ 269. Rights in Real Property Are Governed by the Law of the Situs.

The universal rule is that real property descends according to the law of the *situs* as it exists at the time of the death of the owner.¹¹ The right of a widow to her

Dougherty v. Snyder, 15 Serg. & R. (Pa.) 84, 16 Am. Dec. 520; Cone v. Cone, 61 S. C. 512, 39 S. E. 748; Hascall v. Hafford, 107 Tenn. 355, 89 Am. St. Rep. 952, 65 S. W. 423.

⁹ Warrender v. Warrender, 2 Cl. & Fin. 488; Dolphin v. Robins, 7 H. L. Cas. 390; Cheely v. Clayton, 110 U. S. 701, 28 L. Ed. 298, 4 Sup. Ct. 328; Anderson v. Watts, 138 U. S. 694, 34 L. Ed. 1078, 11 Sup. Ct. 449; Loker v. Gerald, 157 Mass. 42, 34 Am. St. Rep. 252, 16 L. R. A. 497, 31 N. E. 709.

¹⁰ For the purposes of a divorce a wife may acquire a separate residence or domicile from that of her husband.—Moffatt v. Moffatt, 5 Cal. 280, 281; Sawtell v. Sawtell, 17 Conn. 284; Hill v. Hill, 63 Ill. App. 366, *affd.* 166 Ill. 54, 46 N. E. 751; Shaw v. Shaw, 98 Mass. 158; Hunt v. Hunt, 72 N. Y.

217, 243, 28 Am. Rep. 129; Arrington v. Arrington, 102 N. C. 491, 9 S. E. 200; Cook v. Cook, 56 Wis. 195, 43 Am. Rep. 706, 14 N. W. 33, 443.

¹¹ Nelson v. Bridport, 8 Beav. 547; Duncan v. Lawson, 41 Ch. Div. 394; *In re Piercy*, (1895) 1 Ch. 83; Ware v. Wisner, 50 Fed. 310; Kerr v. Moon, 9 Wheat. (U. S.) 565, 6 L. Ed. 161; McGoon v. Scales, 9 Wall. (U. S.) 23, 19 L. Ed. 545; Brine v. Insurance Co., 96 U. S. 627, 636, 24 L. Ed. 858, 862; Arndt v. Griggs, 134 U. S. 316, 33 L. Ed. 918, 10 Sup. Ct. 557; De Vaughn v. Hutchinson, 165 U. S. 566, 41 L. Ed. 827, 17 Sup. Ct. 461; United States v. Perkins, 163 U. S. 625, 630, 41 L. Ed. 287, 16 Sup. Ct. 1073; Plummer v. Coler, 178 U. S. 115, 132, 44 L. Ed. 998, 20 Sup. Ct. 829; Bradshaw v. Ashley, 180 U. S. 59, 68,

estate in dower,¹² and the right of a surviving husband to an estate by curtesy,¹³ are likewise controlled by the law of the *situs*.

§ 270. Succession to Personal Property Is Governed by the Law of the Domicile of the Decedent.

The universal rule, except where expressly modified by statute, is that the next of kin succeed to the personal property of a decedent according to the law of the domicile of the deceased.¹⁴ Thus the right of a wife to suc-

45 L. Ed. 423, 21 Sup. Ct. 297; Orr v. Gilman, 183 U. S. 278, 46 L. Ed. 196, 22 Sup. Ct. 213; Greer County v. Texas, 197 U. S. 235, 49 L. Ed. 736, 25 Sup. Ct. 437; Grimball v. Patton, 70 Ala. 626; Clark's Appeal, 70 Conn. 195, 39 Atl. 155; Crolly v. Clark, 20 Fla. 849; Cooper v. Ives, 62 Kan. 395, 63 Pac. 434; Sneed v. Ewing, 5 J. J. Marsh (Ky.) 460, 22 Am. Dec. 41; Page v. McKee, 3 Bush (Ky.) 135, 96 Am. Dec. 201; Thomas v. Tanner, 6 T. B. Mon. (Ky.) 52, 58; Short v. Galway, 83 Ky. 501, 507, 4 Am. St. Rep. 168; Succession of Packwood, 9 Rob. (La.) 438, 41 Am. Dec. 341; Sevier v. Douglas, 44 La. Ann. 605, 10 So. 804; Cox v. Von Ahlefeldt, 105 La. 543, 30 So. 175; Potter v. Titcomb, 22 Me. 300; Brewer v. Cox (Md.), 18 Atl. 864; Bloomer v. Bloomer, 2 Bradf. (N. Y.) 339; White v. Howard, 46 N. Y. 144; Matter of Barandon's Estate, 41 Misc. Rep. (N. Y.) 380, 84 N. Y. Supp. 937; McCollum v. Smith, Meigs (19 Tenn.) 342, 33 Am. Dec.

147; Dickinson v. Hoomes' Admr., 8 Grat. (Va.) 353.

As regards posthumous children, the *lex loci rei sitae* prevails.—Eyre v. Storer, 37 N. H. 114.

As to admitting illegitimate children, see Barlow v. Orde, L. R. 3 P. C. 164.

¹² Apperson v. Bolton, 29 Ark. 418; Wilson v. Cox, 49 Miss. 538; Jennings v. Jennings, 21 Ohio St. 56; Atkinson v. Staigg, 13 R. I. 725; Lamar v. Scott, 3 Strob. L. (S. C.) 562.

If a widow elect in a foreign jurisdiction not to take under the will of her deceased husband, her rights to dower and distribution are controlled by the law of the forum.—Wilson v. Cox, 49 Miss. 538.

¹³ Brewer v. Cox (Md.), 18 Atl. 864.

¹⁴ Thompson v. Advocate General, 12 Cl. & F. 1, 13 Sim. 153; Crookenden v. Fuller, 1 Sw. & Tr. 441; Doglioni v. Crispin, L. R. 1 H. L. 301; Gambier v. Gambier, 7 Sim. 263; Hamilton v. Dallas,

ceed to the personal property of her husband, in the event of his dying intestate, is governed by the law of

1 Ch. D. 257; *Munroe v. Douglas*, 5 Madd. 379; *In re Johnson*, (1903) 1 Ch. 821; *Armstrong v. Lear*, 8 Peters (U. S.) 52, 8 L. Ed. 863; *Harrison v. Nixon*, 9 Peters (U. S.) 483, 9 L. Ed. 201; *Wilkins v. Ellett*, 108 U. S. 256, 27 L. Ed. 718, 2 Sup. Ct. 641; *Eidman v. Martinez*, 184 U. S. 578, 46 L. Ed. 697, 22 Sup. Ct. 515; *Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 439, 23 Sup. Ct. 277; *King v. Martin*, 67 Ala. 177; *Gibson v. Dowell*, 42 Ark. 164; *Rockwell v. Bradshaw*, 67 Conn. 8, 9, 34 Atl. 758; *Mitchell v. Word*, 64 Ga. 208; *Thieband v. Sebastian*, 10 Ind. 454; *Short v. Galway*, 83 Ky. 501, 507, 4 Am. St. Rep. 168; *Abston v. Abston*, 15 La. Ann. 137; *Potter v. Titcomb*, 22 Me. 300; *Gilman v. Gilman*, 53 Me. 184; *Shannon v. White*, 109 Mass. 146; *Richardson v. Lewis*, 21 Mo. App. 531; *Minkler v. Woodruff*, 12 Neb. 267; *Vandewalker v. Rollins*, 63 N. H. 460, 463, 3 Atl. 625; *Champollion v. Corbin*, 71 N. H. 78, 51 Atl. 674; *Harrall v. Wallis*, 37 N. J. Eq. 458; *Harral v. Harral*, 39 N. J. Eq. 279, 51 Am. Rep. 17; *Graham v. Public Administrator*, 4 Bradf. (N. Y.) 127; *Matter of Braithwaite*, 19 Abb. N. C. (N. Y.) 113, 10 N. Y. St. Rep. 170; *Sherwood v. Wooster*, 11 Paige (N. Y.) 441; *Holmes v. Remsen*, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581; *Matter of Barandon's Estate*, 41 Misc.

Rep. (N. Y.) 380, 84 N. Y. Supp. 937; *Grant v. Reese*, 94 N. C. 720; *Tucker v. Markland*, 101 N. C. 422, 8 S. E. 169; *Freeman's Appeal*, 68 Pa. St. 151; *Stent v. McLeod's Exrs.*, 2 McCord Eq. (S. C.) 354; *White v. Tennant*, 31 W. Va. 790, 13 Am. St. Rep. 896, 8 S. E. 596.

The law of the testator's domicile controls the disposition of personal property by will, or the rights of the heir, in case the owner dies intestate.—*Jones v. Habersham*, 107 U. S. 174, 179, 27 L. Ed. 401, 2 Sup. Ct. 336; *Sickles v. City of New Orleans*, 80 Fed. 868, 26 C. C. A. 204; *Lawrence v. Kitteridge*, 21 Conn. 577, 56 Am. Dec. 385; *Holmes v. Remsen*, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581.

In *Price v. Dewhurst*, 8 Sim. 279, Sir Launcelot Shadwell says: "I apprehend that it is now clearly established by a great variety of cases which it is not necessary to go through in detail, that the rule of law is this: that when a person dies intestate, his personal estate is to be administered according to the law of the country in which he was domiciled at the time of his death, whether he was a British subject or not; and the question whether he died intestate or not must be determined by the law of the same country."

Distribution is governed by the

his domicile at the time of his death.¹⁵ In the event of a wife dying intestate, the right of a surviving husband to share in her personal property is likewise governed by the law of her domicile at the time of her death.¹⁶ And, since it is the law in force at the time of death which controls the right to succeed to personal property, subsequent changes in the statute are of no effect.¹⁷

law of the testator's domicile.—*Estate of Apple*, 66 Cal. 432, 6 Pac. 7; *Whitney v. Dodge*, 105 Cal. 192, 38 Pac. 636.

The proceeds of a policy of life insurance made payable to the estate of the insured, in the event of the insured dying intestate, are distributed according to the laws of succession of the last domicile of the deceased.—*Matter of Negus*, 27 Misc. Rep. (N. Y.) 165, 58 N. Y. Supp. 377; *Ellis v. Northwestern Mutual Life Ins Co.*, 100 Tenn. 177, 43 S. W. 766.

It was held that shares of the capital stock of a bank are personal property, and the owner dying intestate, they will be distributed according to the laws of succession of the last domicile of the deceased.—*Lowndes v. Cooch*, 87 Md. 478, 40 L. R. A. 380, 39 Atl. 1045.

Personal property held in trust by one person for the benefit of another descends in accord with the law of the domicile of the cestui que trust, even though the trustee may be domiciled in a different state and although the property may be subject to taxa-

tion in such other state.—*Yore v. Cook*, 67 Ill. App. 586.

¹⁵ *Garland v. Rowan*, 2 Smedes & M. (Miss.) 617; *Richardson v. Lewis*, 21 Mo. App. 531; *Spier's Appeal*, 26 Pa. St. 233.

Although a man and woman marry in one jurisdiction, if they subsequently remove to another and acquire a domicile there, at the death of either, the law of the last domicile controls as to the disposition of the personal property.—*Matter of Majot's Estate*, 199 N. Y. 29, 29 L. R. A. (N. S.) 780, 92 N. E. 402.

¹⁶ *Davison v. Gibson*, 56 Fed. 443, 5 C. C. A. 543; *Yore v. Cook*, 67 Ill. App. 586.

¹⁷ *Lynch v. Paraguay Government*, L. R. 2 P. & D. 268; *Remington v. Metropolitan Sav. Bank*, 76 Md. 546, 25 Atl. 666; *Deake's Appeal*, 80 Me. 50, 51, 12 Atl. 790.

The repeal of the statute regarding perpetuities subsequent to the death of the testator, held not to affect the construction of his will.—*Cody v. Staples*, 80 Conn. 82, 67 Atl. 1.

Statutes which do not go into effect until after the death of the

In some states statutes have been enacted which affect the general rule, as where a decedent who was domiciled in another jurisdiction at the time of his death left personal property which was physically within the state, such acts have provided that in such instances the personalty could be distributed according to the law of the state rather than the law of the testator's domicile. Such statutes, however, can affect only such personal property as is actually within the state and under the jurisdiction of its laws.¹⁸

§ 271. Devises of Real Property Are Controlled by the Law of the Situs.

Although one may be the heir at law or of the next of kin of a decedent, if named as a beneficiary under the decedent's will, he takes by reason of the devise or bequest and under the will, not by reason of relationship.¹⁹ And a devisee under a will takes a vested interest in the property immediately upon the death of the testator although the probate may be long delayed.²⁰

testator, do not affect the construction of his will.—*Stoepel v. Satterthwaite*, 162 Mich. 457, 127 N. W. 673; *Aganoor's Trusts*, 64 L. J. Ch. 521; *Hunter v. Green*, 22 Ala. 329.

If a corporation is prevented, at the time of the death of a testator, from taking a legacy or devise under his will, because of the law as it exists at that time, a subsequent change in the statute will not alter the case, and the effect, as to the property involved, is as if the testator died intestate.—*Lynch v. Paraguay*

Government, L. R. 2 P. & D. 268; *Hartson v. Elden*, 50 N. J. Eq. 522, 26 Atl. 561; *White v. Howard*, 46 N. Y. 144.

¹⁸ *Russell v. Madden*, 95 Ill. 485; *Cooper v. Beers*, 143 Ill. 25, 33 N. E. 61; *Carroll v. McPike*, 53 Miss. 569; *Speed v. Kelly*, 59 Miss. 47.

¹⁹ *Bank of Ukiah v. Rice*, 143 Cal. 265, 76 Pac. 1070.

²⁰ *Touart v. Rickert*, 163 Ala. 362, 50 So. 896; *Carter v. Whitcomb*, 74 N. H. 482, 17 L. R. A. (N. S.) 733, 69 Atl. 779.

Devises of real property must not be confused with bequests of personalty; the former being immovable and having a fixed *situs*, while the latter are movable and follow the person of the owner. Devises of real property are controlled by the law of the jurisdiction wherein such property is situated, as such law exists at the death of the testator. As to devises of realty the *lex loci rei siti* controls as to the formalities of execution, testamentary capacity of the testator, and the construction of the instrument, irrespective of the domicile of the testator or the date or place of the execution of the will.²¹ Therefore, if a testator by his will disposes of real estate

21 Trotter v. Trotter, 3 Wils. & S. 407, s. c., 4 Bligh N. S. 502; Bowman v. Reeve, Prec. in Ch. 577; Bovey v. Smith, 1 Vern. 85, 2 Ch. Cas. 124; Brodie v. Barry, 2 Ves. & B. 131; Freke v. Lord Carbery, L. R. 16 Eq. 461; United States v. Crosby, 7 Cranch (U. S.) 115, 3 L. Ed. 287; Kerr v. Moon, 9 Wheat. (U. S.) 565, 569, 6 L. Ed. 161, 163; Darby v. Mayer, 10 Wheat. (U. S.) 465, 6 L. Ed. 367; Robertson v. Pickrell, 109 U. S. 608, 27 L. Ed. 1049, 3 Sup. Ct. 407; Readman v. Ferguson, 13 App. (D. C.) 60; Varner v. Bevil, 17 Ala. 286; Haggart v. Ranney, 73 Ark. 344, 84 S. W. 703; Murdoch v. Murdoch, 81 Conn. 681, 129 Am. St. Rep. 231, 72 Atl. 290; Croll v. Clark, 20 Fla. 849; Knight v. Wheedon, 104 Ga. 309, 30 S. E. 794; Carstens v. Murray, 122 Ga. 396, 2 Ann. Cas. 590, 50 S. E. 131; Evansville Ice & Cold Storage Co. v. Winsor, 148 Ind. 682, 48 N. E. 592; Folsom v. Board of Trustees,

210 Ill. 404, 71 N. E. 384; Peet v. Peet, 229 Ill. 341, 11 Ann. Cas. 492, 13 L. R. A. (N. S.) 780, 82 N. E. 376; Coombs v. Carne, 236 Ill. 333, 86 N. E. 245; Amrine v. Hamer, 240 Ill. 572, 88 N. E. 1036; Dibble v. Winter, 247 Ill. 243, 93 N. E. 145; Calloway v. Doe, 1 Blackf. (Ind.) 372; Cornelison v. Browning, 10 B. Mon. (Ky.) 425; Crofton v. Ilsley, 4 Greenl. (Me.) 134, 138; Potter v. Titcomb, 22 Me. 300, 303; Lindsay v. Wilson, 103 Md. 252, 2 L. R. A. (N. S.) 408, 63 Atl. 566; Sewall v. Wilmer, 132 Mass. 131; Jacobs v. Whitney, 205 Mass. 477, 18 Ann. Cas. 576, 91 N. E. 1009; Eyre v. Storer, 37 N. H. 114; In re Barandon's Estate, 41 Misc. Rep. 380, 84 N. Y. Supp. 937; Abell v. Douglass, 4 Denio (N. Y.) 305; Knox v. Jones, 47 N. Y. 389; Vogel v. Lehritter, 139 N. Y. 223, 34 N. E. 914; Bailey v. Bailey, 8 Ohio 239; Flannery's Will, 24 Pa. St. 502; Atkinson v. Staigg, 13 R. I. 725;

situated in various states, the disposition in each jurisdiction is governed by the law of that jurisdiction. The court in each state wherein the land is situated may construe the will and determine the title to the property in so far as the real property within its borders is concerned, and the decree of such court is final as to such lands; but such decree has no effect on lands without the state, nor will it control the decisions of courts in other jurisdictions as to the real property situated therein.²² The foregoing is the universal rule except as modified by

Coy v. Gaye (Tex. Civ. App.), 84 S. W. 441.

Compare: *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324.

Devises of real property are construed and take effect according to the law of the situs.—*United States v. Crosby*, 7 Cranch (U. S.) 115, 3 L. Ed. 287; *McGoon v. Scales*, 9 Wall. (U. S.) 23, 19 L. Ed. 545; *Missouri K. & T. Trust Co. v. Krumseig*, 172 U. S. 351, 355, 43 L. Ed. 474, 19 Sup. Ct. 179; *Clarke v. Clarke*, 178 U. S. 186, 44 L. Ed. 1028, 20 Sup. Ct. 873; *Bradshaw v. Ashley*, 180 U. S. 59, 68, 45 L. Ed. 423, 21 Sup. Ct. 297; *Orr v. Gilman*, 183 U. S. 278, 286, 46 L. Ed. 196, 22 Sup. Ct. 213.

The validity of a will of real property as to its form and execution is governed by the law of the situs.—*Topham v. Portland*, 1 De G. J. & Sm. 578, 32 L. J. Ch. 257; *United States v. Fox*, 94 U. S. 315, 320, 24 L. Ed. 192, 193; *Robertson v. Pickrell*, 109 U. S. 608,

610, 27 L. Ed. 1049, 3 Sup. Ct. 407; *Bingham's Appeal*, 64 Pa. St. 345; *Blount v. Walker*, 28 S. C. 545, 6 S. E. 558.

A will duly executed in one state with all the formalities required by the laws of another state, and recorded in the latter, controls the disposition of lands situated in such latter state.—*Stevens v. Larwill*, 110 Mo. App. 140, 84 S. W. 113, Rev. Stat. Mo. 1899, § 4383.

The probate of a will in one state will not pass land in another unless the will is in accord with law of the situs, but this may be changed by statute.—*McCormick v. Sullivant*, 10 Wheat. (U. S.) 192, 6 L. Ed. 300; *Brine v. Ins. Co.*, 96 U. S. 627, 24 L. Ed. 858; *Robertson v. Pickrell*, 109 U. S. 608, 27 L. Ed. 1049, 3 Sup. Ct. 407; *Overby v. Gordon*, 177 U. S. 214, 44 L. Ed. 741, 20 Sup. Ct. 603.

²² *Clark's Appeal*, 70 Conn. 195, 39 Atl. 155; *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210; *Knox v.*

statute, as where the jurisdiction of the *situs* accepts the will of a testator which has been executed according to the law of his domicile or of the place where such will was executed. Particular reference must be had to the statutes in all cases.

A clause granting both real and personal property to the same beneficiary is severable, the two species of property being controlled by the respective laws which govern the disposition of each.²³

Jones, 47 N. Y. 389; Haywood v. Daves, 81 N. C. 8; Ford v. Ford, 72 Wis. 621, 40 N. W. 502.

As to devises of realty, a foreign will is construed according to the laws of the state wherein the property is situated, irrespective of decisions by the courts of the state wherein the will was executed.—Folsom v. Board of Trustees, 210 Ill. 404, 71 N. E. 384.

Although a will may have been duly executed according to the laws of the state wherein it was made, yet its validity, in so far as it disposed of real property in a different state, is determined by the courts of the state where the property is located, and their decision is conclusive.—Monypeny v. Monypeny, 202 N. Y. 90, 95 N. E. 1.

In Hosler v. Haines, 7 Ohio C. C. (N. S.) 261, a devise of realty under the will of a testator executed in another state, was construed under the laws of Ohio as to lands situated therein, and it was held that a life estate

only was passed, although under the laws of the other state the devise would have transferred the fee.

It has been held that a will of lands lying in Virginia may be proved in that state, notwithstanding such will had been declared void in the state where the testator resided.—Rice v. Jones, 4 Call (Va.) 89; Morrison v. Campbell, 2 Rand. (Va.) 206, 217.

Law of situs of real property governs will disposing of same, therefore where a testatrix made her will in California and died within less than thirty days thereafter and by such will disposed of property situated in the State of Washington for charitable purposes, although such devise was void under the laws of California, the court held that the devise must be construed according to the laws of the State of Washington.—In re Stewart's Estate, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723.

²³Hughes v. Hughes, 14 La. Ann. 85, 87; Knox v. Jones, 47 N. Y. 389.

§ 272. Intention of the Testator: By Which Law Governed.

As to the intention of the testator which is to be drawn from the language of his will, either as to devises of real property or as to bequests of personalty, the general rule is that the intention of the testator is determined by the law of his domicile, irrespective of the *situs* of the property, for it is assumed that a testator in making his will uses language, the meaning of which can best be explained by the law or usage of his domicile.²⁴ There is some conflict of decision as to whether intention is governed by the law of the domicile at the testator's death or at the date of the execution of his will. The better rule seems to be that the law of the domicile at the date of execution should govern. When a testator executes his will, he expresses the intention then existing, and the language employed would naturally be used in the light of the laws and usages existing at that time. If his wishes change, a testator may alter his dispositions. He has in mind circumstances and conditions surrounding him at the time that he makes his will, and they should govern, subsequent events having no force or effect.²⁵

²⁴ *Maxwell v. Hyslop*, L. R. 4 Eq. 407, 413; *Ford v. Ford*, 80 Mich. 42, 44 N. W. 1057; *Crusoe v. Butler*, 36 Miss. 150; *Wilson v. Cox*, 49 Miss. 538; *In re Warner's Estate*, 39 Misc. Rep. (N. Y.) 432, 79 N. Y. Supp. 363; *McManus v. McManus*, 179 N. Y. 338, 72 N. E. 235.

Contra: Sevier v. Douglas, 44 La. Ann. 605, 10 So. 804.

The adjudication of the forum of the domicile of the testator as to the intention of the testator, is accepted by the forum of the

situs.—*Ford v. Ford*, 80 Mich. 42, 44 N. W. 1057.

The law of the domicile of the testator may be considered for the purpose of ascertaining the intent regarding a devise of real property in another state.—*Peet v. Peet*, 229 Ill. 341, 11 Ann. Cas. 492, 13 L. R. A. (N. S.) 780, 82 N. E. 376.

²⁵ *Staigg v. Atkinson*, 144 Mass. 564, 12 N. E. 354; *In re Warner's Estate*, 39 Misc. Rep. (N. Y.) 432, 79 N. Y. Supp. 363; *McManus v. McManus*, 179 N. Y.

Devises of real property and bequests of personalty to a class, such as next of kin, children, brothers, cousins, are to be construed by the law of the testator's domicile; but since the rule is that words descriptive of a class are presumed to refer to those answering the description at the time of the testator's death, the law which would govern would be that of the testator's domicile as it existed at the time of his demise.²⁶

§ 273. Bequests of Personal Property: General Rule Is That Law of Testator's Last Domicile Controls.

When a testator makes his will he generally strives to have it conform to all the formalities required by the statutes then existing. When once executed, to him it is a finished affair and unless circumstances arise which

338, 72 N. E. 235; *In re Hoffman's Will*, 201 N. Y. 247, 94 N. E. 990; *Atkinson v. Staigg*, 13 R. I. 725.

The intention of the testator may be shown from conditions existing at the time the will was executed; thus where two residuary legatees died prior to the testator, it was held that the testator was presumed to have expected, when he executed his will, that his dispositions would become effective, and that his intention as to the disposition of the residue was not to be ascertained from events arising subsequent to execution.—*In re Hoffman's Will*, 201 N. Y. 247, 94 N. E. 990.

The law existing at the time of the testator's death is to be applied.—*Sumpter v. Carter*, 115 Ga. 893, 60 L. R. A. 274, 42 S. E. 324.

Since the intention of the tes-

tator controls, he may express in his will the law which is to control, such as devising property situated in a foreign jurisdiction to those persons who would take under the law of such foreign jurisdiction if he should die intestate.—*In re Reyle's Estate*, 18 Pa. Co. Ct. 336.

²⁶ *In re Ferguson*, (1902) 1 Ch. 483; *Armstrong v. Lear*, 8 Pet. (U. S.) 52, 8 L. Ed. 863; *Harrison v. Nixon*, 9 Pet. (U. S.) 483, 9 L. Ed. 201; *Ennis v. Smith*, 14 How. (U. S.) 400, 14 L. Ed. 472; *Hutchinson Investment Co. v. Caldwell*, 152 U. S. 65, 68, 38 L. Ed. 356, 14 Sup. Ct. 504; *Proctor v. Clark*, 154 Mass. 45, 12 L. R. A. 721, 27 N. E. 673; *Lincoln v. Perry* (*Perry v. Aldrich*), 149 Mass. 368, 4 L. R. A. 215, 21 N. E. 671.

cause him to alter the dispositions which he has made, it generally remains unchanged; yet on the other hand a will is ambulatory in its nature, revocable during the lifetime of the maker and no interest in the property can pass thereunder until the testator's death. Subsequent to execution, the testator may change his domicile, thus carrying with him personal property which may be subjected to different laws. Statutes in effect when the will was executed may be altered, modified or repealed, or new formalities for execution may be prescribed. The question therefore arises as to what law governs, whether that in force at the time the will was executed, or that existing at the time of the testator's death. The universal rule is that wills of personal property are governed, as to testamentary capacity, form of execution, and construction, by the law of the testator's domicile,²⁷

27 In *re Maraver*, 1 Hagg. Ecc. 498; In *re Osborne*, 1 Dea. & Sev. 4; *Robins v. Dolphin*, 1 Sw. & Tr. 37, s. c., 7 H. L. C. 390; *Price v. Dewhurst*, 8 Sm. 279, s. c., 4 Myl. & C. 76; *Reynolds v. Kortright*, 18 Beav. 417; *Peillon v. Brooking*, 25 Beav. 218; *Anstruther v. Chalmer*, 2 Sim. 1; *Boyes v. Bedale*, 1 Hem. & M. 798; *Bernal v. Bernal*, 3 Myl. & C. 559; *Story, Conflict of Laws*, § 479; *Ferraris v. Hertford*, 3 Curt. 468; *Harrison v. Nixon*, 9 Pet. (U. S.) 483, 9 L. Ed. 201; *Hussey v. Sargent*, 116 Ky. 53, 75 S. W. 211; *Hyman v. Gaskins*, 27 N. C. 267.

Compare: *Price v. Dewhurst*, 4 Myl. & C. 83.

"Personal property has no locality, but is subject to the law of the owner's domicile, as well in

respect to a disposition of it by an act inter vivos as to its transmission by last will and testament, and by succession upon the owner dying intestate."—*Flatauer v. Loser*, 156 App. Div. 591, 141 N. Y. Supp. 951.

In *Moultrie v. Hunt*, 23 N. Y. 394, the court says: "And the Surrogate has shown, by an extract from the same author (Judge Story) that a will executed in one country according to the solemnities there required, is not to be broken by a change of domicile to a place whose laws demand other solemnities. Of the other judges quoted by the Surrogate several of them lay down rules diametrically opposite to those which confessedly prevail in this country and in England. Thus, *Tollier*,

but in this respect two lines of decisions have arisen, one holding that the law at the time of execution controls; the other, that the law existing at the death of the tes-

a writer on the civil law of France, declares that the form of testaments does not depend upon the law of the domicile of the testator, but upon the place where the instrument is in fact executed; and Felix, Malin and Pothier are quoted as laying down the same principle. But nothing is more clear, upon the English and American cases, than that the place of executing the will, if it is different from the testator's domicile, has nothing to do with determining the form of the executing and attesting. In the case referred to from Story's Reports (*Grattan v. Appleton*, 3 Story 755, Fed. Cas. No. 5707) the will was executed in Boston, but was held to be invalid because it was not attested as required by a provincial statute of New Brunswick, which was the place of the testator's domicile."

The decree of the probate court in Massachusetts as to the validity of the will of personal property of a testator who had been domiciled in and who died in Massachusetts, was held conclusive upon the court in New York, and that it could not be collaterally attacked on the ground that the will had been obtained by undue influence.—*Garvey v. Horgan*, 38 Misc. Rep. 164, 77 N. Y. Supp. 290, citing: *Mills v. Duryea*, 7 Cranch

(U. S.) 481, 3 L. Ed. 411; *Crippen v. Dexter*, 13 Gray (Mass.) 330, 333; *Parker v. Parker*, 11 Cush. (Mass.) 519; *Nelson v. Potter*, 50 N. J. L. 324, 15 Atl. 375; *Willett's Appeal*, 50 Conn. 330.

By statute in Illinois, a will of personal property within the state was valid if executed according to the laws of Illinois or if executed and proved according to the place where it was made.—*Palmer v. Bradley*, 142 Fed. 193, affirmed 154 Fed. 311, 83 C. C. A. 231.

"The law of the testator's domicile controls as to the formal requisites essential to the validity of the will as a means of transmitting property, the capacity of the testator, and the construction of the instrument."—*Sickles v. City of New Orleans*, 80 Fed. 868, 26 C. C. A. 204, citing *Crusoe v. Butler*, 36 Miss. 150; *Chamberlain v. Chamberlain*, 43 N. Y. 424, 431.

In *Dupuy v. Seymour*, 64 Barb. (N. Y.) 156: The will of a testatrix whose domicile was in New York and which was executed according to the laws of that state although made while she was abroad in France and although she remained abroad continuously and died there more than two years later, was held valid and admitted to probate in New York.—*Dupuy v. Wurtz*, 53 N. Y. 556, affirmed the above case.

tator governs.²⁸ In this connection bequests of personal property must not be confused with devises of realty, since the latter are controlled by the law of the *situs*.

The general rule, except as modified or changed by statute, is that a will disposing of personal property is governed, as to the formal requisites essential to its validity and as to its construction, by the law in force at the

The law of domicile of a testator governs as to the formal requirements necessary to constitute a valid will disposing of personal property.—*Crusoe v. Butler*, 36 Miss. 150; *Chamberlain v. Chamberlain*, 43 N. Y. 424.

The construction of wills of personal property is governed by the law of domicile of the testator unless it is manifest the testator had in mind the laws of some other place.—*Harrison v. Nixon*, 9 Pet. (U. S.) 483, 9 L. Ed. 201; *Wilkins v. Allen*, 18 How. (U. S.) 385, 15 L. Ed. 396; *Lanius v. Fletcher*, 100 Tex. 550, 101 S. W. 1076.

As to the right and the power of a decedent to make a will disposing of personal property, they are governed by the law of the testator's last domicile.—*Bremer v. Freeman*, 10 Moore P. C. C. 306; *Varner v. Bevil*, 17 Ala. 286; *Sturdivant v. Neill*, 27 Miss. 157; *Trimble v. Dzieduzyki*, 57 How. Pr. (N. Y.) 208.

Questions as to whether or not legacies of personal property may have lapsed, are determined by the law of the testator's domicile.—*Anstruther v. Chalmer*, 2 Sim.

1; *Lowndes v. Cooch*, 87 Md. 478, 40 L. R. A. 380, 39 Atl. 1045.

See *Lindsay v. Wilson*, 103 Md. 252, 2 L. R. A. (N. S.) 408, 63 Atl. 566, as to the statutory effect in Maryland of wills executed outside of the state but according to the formalities required at the place of execution.

²⁸ A will is ambulatory and revocable during the lifetime of the testator and no estate or interest in the property of the testator can pass thereunder during his life. As to a will which has been executed it has been said that "in one sense it is, no doubt, a finished affair; but I think it is no more consummated than a bond would be which the obligor had prepared for use by signing and sealing, but had kept in his own possession for future use." It is admitted that the cases are not entirely parallel, but death or delivery are essential in one case or the other. "In the case of a will it requires the death of the party, and in that of a bond the delivery of the instrument, to induce it with any legal operation or effect. The existence of a will,

place of domicile of the testator at the time of his death.²⁹ This rule prevails although the personalty may be actu-

duly executed and attested, at one period during a testator's life, is a circumstance of no legal importance. He must die leaving such a will, or the case is one of intestacy."—*Moultrie v. Hunt*, 23 N. Y. 394.

29 *Bempde v. Johnstone*, 3 Ves. Jun. 198; *Somerville v. Somerville*, 5 Ves. Jun. 750; *Bremer v. Freeman*, 10 Moore P. C. C. 306; *Pottinger v. Wightman*, 3 Mer. 68; *In re Prince Peter Georgevitch Oldenburg*, L. R. 9 Pro. Div. 234; *Lynch v. Paraguay Government*, L. R. 2 P. & D. 268; *Sickles v. City of New Orleans*, 80 Fed. 868, 26 C. C. A. 204; *Watkins v. Eaton*, 173 Fed. 133; *West Virginia Pulp & Paper Co. v. Miller*, 176 Fed. 284, 100 C. C. A. 176; *Smith v. Union Bank*, 5 Pet. (U. S.) 518, 519, 8 L. Ed. 212; *Harrison v. Nixon*, 9 Pet. (U. S.) 483, 9 L. Ed. 201; *Turner v. Fenner*, 19 Ala. 355; *Lawrence v. Kitteridge*, 21 Conn. 577, 56 Am. Dec. 385; *Irwin's Appeal*, 33 Conn. 128; *Murdoch v. Murdoch*, 81 Conn. 681, 129 Am. St. Rep. 231, 72 Atl. 290; *Sutton v. Chenault*, 18 Ga. 1; *Hargroves v. Redd*, 43 Ga. 142; *Jackson ex rel. McConnell v. Wilcox*, 1 Scam. (2 Ill.) 344, 373; *Dibble v. Winter*, 247 Ill. 243, 93 N. E. 145; *Irving v. McLean*, 4 Blackf. (Ind.) 52; *Barnes Admr. v. Brash-ear*, 2 B. Mon. (Ky.) 380, 382; *Coleman v. O'Leary's Exrs.*, 114

Ky. 388, 70 S. W. 1068; *Hussey v. Sargent*, 116 Ky. 53, 75 S. W. 211; *Hewitt v. Green*, 77 N. J. Eq. 345, 77 Atl. 25; *Ward v. Standard*, 82 App. Div. 386, 81 N. Y. Supp. 906; *Bowen v. Hackney*, 136 N. C. 187, 67 L. R. A. 440, 48 S. E. 633; *Perin v. McMicken's Heirs*, 15 La. Ann. 154; *Estate of Lewis*, 32 La. Ann. 385; *Succession of Thomas*, 35 La. Ann. 19; *Crofton v. Ilsley*, 4 Greenl. (Me.) 134, 138; *Potter v. Titcomb*, 22 Me. 300, 304; *Gilman v. Gilman*, 52 Me. 165, 83 Am. Dec. 502; *Cushing v. Aylwin*, 12 Metc. (Mass.) 169; *Pray v. Waterston*, 12 Metc. (Mass.) 262; *Fellows v. Miner*, 119 Mass. 541; *McCurdy v. McCallum*, 186 Mass. 464, 72 N. E. 75; *Jacobs v. Whitney*, 205 Mass. 477, 18 Ann. Cas. 576, 91 N. E. 1009; *Crusoe v. Butler*, 36 Miss. 150; *Nat v. Coons*, 10 Mo. 543; *Wakefield v. Phelps*, 37 N. H. 295; *Lawrence v. Hebbard*, 1 Bradf. (N. Y.) 252; *In re Blancan*, 4 Redf. (N. Y.) 151; *Bloomer v. Bloomer*, 2 Bradf. (N. Y.) 339; *Schultz v. Dambmann*, 3 Bradf. (N. Y.) 379; *Hunt v. Mootrie*, 3 Bradf. (N. Y.) 322; *In re Roberts' Will*, 8 Paige (N. Y.) 519; *Parsons v. Lyman*, 20 N. Y. 103; *Moultrie v. Hunt*, 23 N. Y. 394; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Knox v. Jones*, 47 N. Y. 389; *Despard v. Churchill*, 53 N. Y. 192; *Dupuy v. Wurtz*, 53

ally situated in another state and although the disposi-

N. Y. 556; *Williams' Lessee v. Veach*, 17 Ohio 171, 49 Am. Dec. 453; *Meese v. Keefe*, 10 Ohio 362; *Thomason's Estate*, 13 Phila. (Pa.) 376; *Desesbats v. Berquier*, 1 Bin. (Pa.) 336, 2 Am. Dec. 448; *In re Beaumont's Estate*, 216 Pa. 350, 9 Ann. Cas. 42, 65 Atl. 799; *Langley v. Langley*, 18 R. I. 618, 622, 30 Atl. 465; *Conover v. Chapman*, 2 Bailey (S. C.) 436; *Houston v. Houston*, 3 McCord L. (S. C.) 491, 15 Am. Dec. 647; *In re Elcock's Will*, 4 McCord L. (S. C.) 39, 17 Am. Dec. 703; *Hamilton v. Flinn*, 21 Tex. 713.

Compare: *Thorne v. Watkins*, 2 Ves. Sen. 35; *Harvey v. Richards*, 1 Mason (U. S. C. C.) 381, Fed. Cas. No. 6184; *Grattan v. Appleton*, 3 Story (U. S. C. C.) 755, 765, Fed. Cas. No. 5707; *Dixon v. Ramsay*, 3 Cranch (U. S.) 319, 2 L. Ed. 453; *United States v. Crosby*, 7 Cranch (U. S.) 115, 3 L. Ed. 287; *Kerr v. Moon*, 9 Wheat. (U. S.) 565, 6 L. Ed. 161; *Dorsey's Exr. v. Dorsey's Admr.*, 5 J. J. Marsh. (Ky.) 280, 22 Am. Dec. 33; *Atchison's Heirs v. Lindsey*, 6 B. Mon. (Ky.) 86, 43 Am. Dec. 153; *Potter v. Titcomb*, 22 Me. 300; *Hunter v. Bryson*, 5 Gill & J. (Md.) 483, 25 Am. Dec. 313; *Fay v. Haven*, 3 Metc. (Mass.) 109; *Dawes v. Head*, 3 Pick. (Mass.) 128; *Davis v. Estey*, 8 Pick. (Mass.) 475, 476; *Jennison v. Hapgood*, 10 Pick. (Mass.) 77, 100; *Campbell v. Shel-*

don, 13 Pick. (Mass.) 8; *Richards v. Dutch*, 8 Mass. 506; *Dawes v. Boylston*, 9 Mass. 337, 355, 6 Am. Dec. 72; *Stevens v. Gaylord*, 11 Mass. 256, 264; *Suarez v. Mayor of New York*, 2 Sandf. Ch. (N. Y.) 173, 174, 177; *Shultz v. Pulver*, 3 Paige (N. Y.) 182; *Holmes v. Remsen*, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581; *Leake v. Gilchrist*, 13 N. C. 73; *Stent v. McLeod's Exrs.*, 2 McCord Eq. (S. C.) 354; *Bradley v. Lowry*, 1 Spear Eq. (S. C.) 1, 3, 13, 39 Am. Dec. 142.

The construction of a will is according to the law in effect at the time of the death of the testator.—*Hasluck v. Pedley*, L. R. 19 Eq. 271.

In *Estate of Learned*, 70 Cal. 140, 11 Pac. 587, it was held that an olographic will made prior to the enactment of the statute authorizing such a will was valid where the testator lived until after the enactment of the law.

In *Criswell v. Seay*, 19 La. 528, it was held that the capacity of the donor to make a gift mortis causa was governed by the statute in effect at the time of the donor's death, because it was not until such time that the donation took effect.

The law of the testator's domicile controls bequests of personal property, although it may be in another state.—*Rackemann v. Taylor*, 204 Mass. 394, 90 N. E. 552.

tion of such property might be invalid by the laws of the state where the personalty is situated.³⁰

The validity of a will is determined by the laws existing at the time of the death of the testator, subsequent events having no effect.—*Rong v. Haller*, 109 Minn. 191, 26 L. R. A. (N. S.) 825, 123 N. W. 471, 806; *Crawford's Heirs v. Thomas*, 114 Ky. 484, 54 S. W. 197, 55 S. W. 12.

Where subsequent to the execution of a will the laws have been changed annulling former enactments regarding the formalities required for the execution of a will and prescribing new requirements, or annulling statutes respecting certain future assets, like the Statute of Uses and Trusts, unless the will is valid under the changed law, it is to that extent revoked by statute.—*De Peyster v. Clendining*, 8 Paige (N. Y.) 295; *Bishop v. Bishop*, 4 Hill (N. Y.) 138; *Moultrie v. Hunt*, 23 N. Y. 394.

As to whether or not interest on legacies may be allowed, is governed by the law of the testator's last domicile.—*In re Kucielski's Estate*, 49 Misc. Rep. 404, 99 N. Y. Supp. 828.

In *Hamilton v. Flinn*, 21 Tex. 713, it was held that although a will may have been executed with all the formalities required by the law existing at the time it was made yet if subsequently a statute is enacted which prescribes

additional formalities with which the will does not comply, if the testator survives until after the passage of such a statute, the will is invalid since it must comply with the requirements of the law in force at the time of the death of the testator.

The laws of the state where the testator died and his will was probated and the estate distributed, govern the construction of the will.—*App v. App*, 106 Va. 253, 55 S. E. 672.

As to personal property the rights of legatees under a will are governed by the law of the domicile of the testator at the time of his death.—*Price v. Dewhurst*, 4 Myl. & C. 76; *Matter of Baubichon*, 49 Cal. 18; *Thomas v. Morrisett's Estate*, 76 Ga. 384; *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191, 3 Am. Dec. 535; *Goodall v. Marshall*, 11 N. H. 88, 35 Am. Dec. 472; *Hutton v. Hutton*, 40 N. J. Eq. 461, 2 Atl. 280; *Merritt v. Corties*, 71 Hun 612, 24 N. Y. Supp. 561; *Freeman's Appeal*, 68 Pa. St. 151.

³⁰ A will duly executed and admitted to probate in one state may dispose of personal property in another state, although such will would be invalid in the latter state.—*Delta Trust & Banking Co. v. Pearce*, 92 Miss. 377, 45 So. 981.

§ 274. The Same Subject: Decisions to the Contrary.

There are many decisions contrary to the general rule and which hold that the law of the testator's domicile in force at the time the will was executed, governs it as to formalities of execution and construction.³¹ Under such decisions, statutes enacted subsequent to the making of the will would have no force or effect, although a will is admittedly ambulatory in nature and revocable at the pleasure of the maker. In such decisions, however, the general principle is not denied, but the conclusion is arrived at by the construction of the later statutes and by holding them to have no retrospective effect. Thus, where a will disposing of personal property was executed according to all the formalities prescribed by the law of the testator's domicile at the time the will was made, although a statute subsequently enacted prescribes additional formalities of execution and the like, such statute has been construed to have no retrospective effect and to refer only to wills executed subsequent to its passage. Such construction is based on the principle that retrospective laws generally work an injustice and that the statutes should be given a prospective effect only unless there is a positive decree in the act that it shall apply to all wills whensoever executed.³² But in all cases it is

³¹ *Downing v. Townsend*, Amb. 280; *Gillmore v. Shooters' Exrs.*, 2 Mod. 310; *Gaylor's Appeal*, 43 Conn. 82; *Lane's Appeal*, 57 Conn. 182, 14 Am. St. Rep. 94, 4 L. R. A. 45, 17 Atl. 926; *Mullen v. McKelvy*, 5 Watts (Pa.) 399; *Taylor v. Mitchell*, 57 Pa. St. 209; *Roach v. Roach*, 25 R. I. 454, 56 Atl. 684; *Giddings v. Turgeon*, 58 Vt. 106, 4 Atl. 711; *Barker v. Hinton*, 62

W. Va. 639, 13 Ann. Cas. 1150, 59 S. E. 614.

³² The cases which hold that the law in effect at the time the will was made controls the formalities of execution rely principally upon the construction of the statute, namely, they apply the principle of construction that a statute should always be interpreted to operate prospectively and not ret-

the rule that as to bequests of personalty, except where

respectively, and that therefore, unless the language of the statute clearly expresses a retrospective intent, it should be given no effect as to wills executed prior to its passage. They hold that when a will is executed the testator has completed the act of disposition, retaining only the power of revocation, and there can be no revocation unless it is exercised in the manner prescribed by law. It has therefore been held that where the statute is to the effect that "no will or codicil shall be valid to pass any estate unless," etc., such a statute has only a prospective effect and does not invalidate wills sufficiently executed under former laws, although not complying with the requirements which such statute prescribed.—Lane's Appeal, 57 Conn. 182, 14 Am. St. Rep. 94, 4 L. R. A. 45, 17 Atl. 926.

In *Taylor v. Mitchell*, 57 Pa. St. 209, the statute under consideration was one which provided "that no estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic or to any person in trust for religious or charitable uses except the same be done by deed or will, attested by two creditable and at the same time disinterested witnesses, at least one calendar month before the decease of the testator or alienor, and all dispositions of property contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin or heirs

according to law." The will in question was executed prior to the enactment of the statute and had not been attested by two creditable and disinterested witnesses, there having been but one witness, which was all that was required when the will was executed. The effect of the decision was that the statute had no retrospective effect and did not affect wills executed before its passage. In deciding the case, the court says: "It is true, that every will is ambulatory until the death of the testator, and the disposition made by it does not actually take effect until then. General words apply to the property of which the testator dies possessed, and he retains the power of revocation as long as he lives. The act of bequeathing or devising, however, takes place when the will is executed, though to go into effect at a future time. The language of the act of the Assembly, in its ordinary use and meaning, relates to wills thereafter to be made. It is only by a technical construction that it can be made to bear a different sense. Such a construction might justly be applied to a law which on its face appears to be retrospective, in order to restrain it to a retrospective operation, but it would certainly be a novelty to apply it conversely."

In *Taylor v. Mitchell*, 57 Pa. St. 209, the court further says:

"Retrospective laws generally if

there exists a statutory regulation to the contrary, they

not universally work injustice, but ought to be so construed only when the mandate of the legislature is imperative. When a testator makes a will, formally executed according to the requirements of the law existing at the time of its execution, it would unjustly disappoint his lawful right of disposition to apply to it a rule subsequently enacted, though before his death. While it is true that every one is presumed to obey the law, the maxim in fact is inapplicable to such a case; for he would have the equal right to presume that no new law would affect his past act, and rest satisfied in security on that presumption."

In *Packer v. Packer*, 179 Pa. St. 580, 57 Am. St. Rep. 516, 36 Atl. 344, it was held that "the rule relating to the proper execution of a will is that it 'must be judged of by the law as it stood at the time of its execution, and not at the time of the death of the testator.'"

In *re Tuller's Will*, 79 Ill. 99, 22 Am. Rep. 164, the statute provided that "a marriage shall be deemed a revocation of a prior will." It was held that the statute was prospective in effect and had reference only to marriages which should take place thereafter, and did not apply to marriages which had been had prior to the passage of the act. To the same effect, see: *Chapman v. Dismar*, 14 App. Cas. (D. C.) 446; *Colcord v. Conroy*, 40

Fla. 97, 23 So. 561; *Roane v. Hollingshead*, 76 Md. 369, 35 Am. St. Rep. 438, 17 L. R. A. 592, 25 Atl. 307; *Kelly v. Stevenson*, 85 Minn. 247, 89 Am. St. Rep. 545, 56 L. R. A. 754, 88 N. W. 739; *Baacke v. Baacke*, 50 Neb. 18, 69 N. W. 303; *Vandever v. Higgins*, 59 Neb. 333, 80 N. W. 1043; *Booth's Will*, 40 Ore. 154, 158, 61 Pac. 1135, 66 Pac. 710; *In re Petridge's Will*, 47 Wash. 77, 91 Pac. 634; *Will of Ward*, 70 Wis. 251, 5 Am. St. Rep. 174, 35 N. W. 731; *In re Will of Lyon*, 96 Wis. 339, 65 Am. St. Rep. 52, 71 N. W. 362.

In *Giddings v. Turgeon*, 58 Vt. 106, 4 Atl. 711, one of the witnesses to the will in question was disqualified from acting as such under the law then existing because of being the husband of the legatee. Prior to the death of the testator the law was changed so that the disqualification just mentioned was removed. It was held, however, the testator dying subsequent to the new law, that the law in effect at the time the will was executed controlled.

In *Barker v. Hinton*, 62 W. Va. 639, 13 Ann. Cas. 1150, 59 S. E. 614, the facts showed that the testatrix made her will in 1862, and died in 1901. She was a resident of Virginia at the time the will was made, the law then requiring attesting witnesses to sign their names in the presence of the testator but not in the presence of each other. This con-

are controlled by the law of the testator's domicile,³³ the conflict being only as to whether the law at execution or at death governs.

§ 275. Effect of a Change of Domicile by the Testator Subsequent to Executing His Will.

If a testator, subsequent to making a testamentary disposition of personal property, removes to a different

tinued to be the law of West Virginia, which was carved out of Virginia in 1863, until it was changed in 1882 so as to require attesting witnesses to sign in the presence of each other and the statute so remained. The point at issue was which statute governed. The decision was that the law existing at the time the will was executed controlled, but the decision was based mainly upon the point that the statute prescribing the additional formalities referred to had no retrospective effect and prescribed only that wills executed or re-executed or republished after its date had to comply with the necessary formalities, but that wills executed before its date were not invalidated by the act.

Contra: The right of an heir or of succession to property is a mere expectancy during the life of the ancestor; it has no force or effect until his death and the rights of heirs or successors must be determined by the laws in existence at the time of the death of the ancestor, in the event of his intestacy. Any supposed rights

which they may have can be defeated by legislation at any time during the life of the ancestor and such a statute would not be deemed to be retrospective since a will is revocable and no rights can be claimed under it until after the death of the testator. A legatee or devisee has no more reason to complain regarding the enactment of a statute prescribing additional formalities with which a former will had not complied than would the heirs have to complain of a change in the law.—*Hamilton v. Flinn*, 21 Tex. 713.

³³ In *Carey's Appeal*, 75 Pa. St. 201, it was held that a will of personal property must be executed according to the law of the domicile of the testator. Thus a will of a testator who had his domicile in Pennsylvania and which will was executed according to the Pennsylvania laws, although executed in Rhode Island and invalid under the laws of that jurisdiction because not attested and subscribed by three witnesses, was held valid and admitted to probate in Pennsylvania.

state, or country, and becomes domiciled there, in the event of his death his will is controlled, as to personality, by the laws of his last domicile. Should different laws prevail and the will fail to comply with the requirements of the law of the last domicile of the testator, such change of domicile would, in effect, be a revocation of the bequests, since the personal property could not pass under the instrument.^{33a}

§ 276. Law Governing the Rights of a Wife or Child.

A testator can dispose of only so much of his personal property as is allowed by law, and he can not deprive his wife of the share which the statute allows to her. In this respect the law of the testator's domicile governs. Thus an American who married in France and became domiciled there, came to America and died, having made a will bequeathing all his personal property away from his wife. It was held that his widow was entitled to one-half thereof in accordance with the law of community property of France, notwithstanding the will.³⁴

^{33a} Irwin's Appeal, 33 Conn. 128; Nat v. Coons, 10 Mo. 543; Matter of Braithwaite, 19 Abb. N. Cas. (N. Y.) 113, 10 N. Y. St. Rep. 170; Matter of Coburn, 9 Misc. Rep. (N. Y.) 437, 30 N. Y. Supp. 383; Dupuy v. Wurtz, 53 N. Y. 556.

A will disposing of personal property might not comply with the statutory requirements of the place where executed, or of the domicile of the testator, yet if it complies with the law of his domicile at his death, it is

valid.—Isham v. Gibbons, 1 Bradf. (N. Y.) 69.

³⁴ Harral v. Harral, 39 N. J. Eq. 279, 51 Am. Rep. 17; s. c., Harrall v. Wallis, 37 N. J. Eq. 458.

The opposite is the rule as to realty. Thus, if a testator domiciled in California where the law of community property prevails, possessing lands in New Jersey, the community law of the former state would not apply to the real estate in the latter.—Pratt v. Douglas, 38 N. J. Eq. 516.

The general rule is, in the event of the death of a husband or father leaving a will which makes no mention of or provision for his wife or his child, that such wife or child is entitled to succeed to the same share of his estate as if he had died intestate. In such a case the right of succession as to personal property is governed by the law of the domicile of the husband or father at the time of his death. The same rule applies as to the rights of a posthumous child.³⁵

§ 277. Statutory Regulations as to Foreign Wills.

Statutes have been enacted in many jurisdictions changing the rule that real property can pass only according to the law of its *situs*, and that personal property can pass only according to the law of the testator's domicile. In some of the states a will made elsewhere in the United States, or in foreign countries, is valid and will pass real and personal property if such will is valid according to the laws of the place where it was made, or of the domicile of the testator.³⁶ In some states,

³⁵ *Harrall v. Wallis*, 37 N. J. Eq. 458; *Harral v. Harral*, 39 N. J. Eq. 279, 51 Am. Rep. 17; *Bloomer v. Bloomer*, 2 Bradf. (N. Y.) 339; *Matter of Braithwaite*, 19 Abb. N. Cas. (N. Y.) 113, 10 N. Y. St. Rep. 170.

The right of a decedent to dispose of his entire personal estate without making provision for his wife or children is governed by the law of his domicile at the time of his death.—*Matter of Lewis Estate*, 32 La. Ann. 385; *Harral v. Harral*, 39 N. J. Eq. 279, 51 Am. Rep. 17; *Matter of Braithwaite*, 19

Abb. N. Cas. (N. Y.) 113, 10 N. Y. St. Rep. 170; *Trimble v. Dzieduz yiki*, 57 How. Pr. (N. Y.) 208; *Matter of Ruppaner*, 15 Misc. Rep. (N. Y.) 654, 37 N. Y. Supp. 429.

³⁶ A statute of a state which authorizes the probate therein of a foreign will which has been executed according to the laws of the place where the will was made has reference only to the wills of testators who are nonresidents of the state at the time of their deaths. Thus a testator, who was domiciled in South Carolina, executed a will of personal property

as in California, a will of personal property is valid there if valid under the law of the testator's domicile at

with all the formalities required by the laws of that state, but prior to his death removed to New York and became domiciled there. Upon his death in New York it was held that his will had to be construed according to the laws of his domicile at the time of his death, i. e., New York, and as the will was not executed according to the formalities required by New York laws of that date, probate was denied.—*Moultrie v. Hunt*, 23 N. Y. 394.

As to a will made elsewhere in the United States being valid and passing real and personal property, if such will is valid according to the laws of the state or territory where it was made.—*Stimson's Ann. Stat. Law*, § 2656, referring to statutes of New Hampshire, Massachusetts, Maine, Vermont, Connecticut, New York, Wisconsin, Maryland, Montana, Arkansas, Dakota and Louisiana. By the same authority, the same principle has been extended to wills executed in foreign countries, referring to statutes of New Hampshire, Massachusetts, Maine, Vermont, Connecticut, New York, Wisconsin, Maryland, Kentucky, Dakota, Montana and Louisiana.

Louisiana Civ. Code, art. 1596, provides that "testaments made in foreign countries, or a state, or other territories of the Union, shall take effect in this state, if

they are clothed with all the formalities prescribed for the validity of wills in the place where they have been respectively made." This is an exception to the general rule, but it does not change the law as to the construction of the contents of the will, and property in Louisiana must be distributed according to the law of that state.—*Succession of Withers*, 45 La. Ann. 556, 12 So. 875.

Under the laws of Maryland, Code, art. 93, § 327, a will executed outside the state is valid therein if executed according to the formalities required by the law of the domicile of the testator at the time it was made. Thus a holographic will executed in and valid under the laws of France passed realty situated in Maryland, although unwitnessed as required in that state.—*Lindsay v. Wilson*, 103 Md. 252, 2 L. R. A. (N. S.) 408, 63 Atl. 566.

In New York, wills of personalty executed anywhere within the United States, Canada, Great Britain and Ireland, according to the laws of the state or country where it is executed, or executed by a nonresident of the state, according to the laws of the testator's residence, are admitted to probate, and the fact that the testator may change his residence subsequent to making the will

the time of his death; but the exception is limited to bequests of personal property, and the provisions of the California law as to charitable bequests apply and may render such bequests void although valid under the law of the testator's domicile.³⁷

§ 278. Chattels Real: Difference Between English and American Rule.

Chattels real may be described as personal interests in real property and are classified as personalty. Being personalty, they should follow the person of the owner. Such is the general rule, and they are bequeathed as personalty and, in the event of intestacy, pass as such.³⁸ In England, however, leases for years have been held, for certain purposes, to be immovable and, therefore, having a fixed *situs*, they do not follow the person of the owner. Consequently in England a testamentary disposition of a leasehold is governed by the law of the *situs* of the lands which they cover and not by the law of the domi-

does not affect its validity as to execution or the construction of its provisions.—Consol. Laws of N. Y. (1909) D., ch. 224.

³⁷ In California, under § 1285 of the Civ. Code, a will made in a state or country in which the testator is domiciled at the time of his death, and valid as a will under the laws of said state or country, is valid in California as to personal property, but the limitations as to charitable bequests imposed by § 1313 of the Civ. Code are imposed on such wills as in the case of a domestic will.

The former rule in California was that in the absence of a positive law to the contrary, the disposition of a decedent's personal estate was governed by the law of his domicile.—Estate of Apple, 66 Cal. 432, 434, 6 Pac. 7; Whitney v. Dodge, 105 Cal. 192, 38 Pac. 636. But since the amendment it is held that charitable bequests in foreign wills are governed by the same rules which control such bequests in domestic wills.—In re Lathrop's Estate, 165 Cal. 243, 131 Pac. 752.

³⁸ See, *ante*, § 255, as to bequests of chattels real.

cile of the testator.³⁹ This rule is in conflict with that in the United States, in the latter mentioned jurisdiction chattels real being classified as personalty and so bequeathed, such bequests being governed by the law of the domicile of the testator.⁴⁰

§ 279. English Rule as to Bequests of Personalty: Statutory Regulations.

The early rule in England was that bequests of personal property were controlled by the law of the testator's last domicile.⁴¹ But by a statute enacted A. D. 1861,⁴² a British subject can make a will of personal property out of the United Kingdom and which will be valid therein if executed in accordance with the forms prescribed either by the law of the place where it is made, or the law of the place of the testator's domicile at the time of the making of the will, or the law in force in that part of the Kingdom of Great Britain wherein is the testator's domicile of origin. Or if the British subject executes his will within the United Kingdom, it is deemed valid if made according to the forms required by the law in force at that time in that part of the United Kingdom where the will is made. The statute further provided that no will should be revoked or become invalid, nor the construction thereof be altered, because of any change in the domicile of the testator after executing his will; but the act did not invalidate any will which

³⁹ Freke v. Lord Carbery, L. R. 16 Eq. 461; In re Gentili, I. R. 9 Eq. 541; Duncan v. Lawson, 41 Ch. Div. 394.

⁴⁰ See, ante, § 255. Despard v. Churchill, 53 N. Y. 192.

⁴¹ Stanley v. Bernes, 3 Hagg.

Ecc. 373; Bremer v. Freeman, 10 Moore P. C. C. 306; De Fogasieras v. Duport, L. R. 11 Ir. 123.

⁴² Statute of 24 and 25 Victoria, ch. 114, designated as Lord Kingsdown's Act.

would have been held valid had the statute not been enacted, yet the testator could revoke a former will of personal property by any instrument which would be valid under the new statute.⁴³ This statute affects British subjects⁴⁴ only and can not, of course, be enforced where the property is not under the jurisdiction of Great Britain.

§ 280. Power of Appointment Exercised by Will.

An apparent exception to the general rule is where a testamentary disposition is made of personal property under a power of appointment granted by the will of another. The one appointed takes under the donor of the power and under his will, the appointment by another being merely an instrumentality whereby the beneficiary was particularly designated. The effect is the same as if the instrument making the appointment had been incorporated in the original will.⁴⁵ The rule is, in such cases, that the will of the testator making the appointment, in so far as it appoints a beneficiary of personal property, is governed, not by the law of his domi-

⁴³ The wording of the statute refers to the form of execution only; yet it was held that an instrument which depended on the above statute for its validity, would be determined to be testamentary or not according to the law of the place upon which its validity depended.—*Pechell v. Hilderley*, L. R. 1 P. & D. 673.

⁴⁴ The statute includes naturalized British subjects (*Goods of Gally*, L. R. 1 Pro. Div. 438), but not foreigners, although domiciled

in England.—*In re Goods of Keller*, 61 L. J. Pro. D. & A. (N. S.) 39.

⁴⁵ *Roach v. Wadham*, 6 East 289; *Cook v. Duckenfield*, 2 Atk. 568; *Middleton v. Crofts*, 2 Atk. 661; *Mosley v. Mosley*, 5 Ves. Jun. 249; *In re Powell*, 39 L. J. Ch. (N. S.) 188; *Braybrooke v. Attorney General*, 9 H. L. Cas. 150; *Silvers v. Canary*, 109 Ind. 267, 9 N. E. 904; *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389; *Matter of Dows' Estate*, 167

cile, but by the law of the domicile of the grantor of the power.⁴⁶ And for this reason, the authority of the one

N. Y. 227, 88 Am. St. Rep. 509, 52 L. R. A. 433, 60 N. E. 439; Smith v. Garey, 2 Dev. & B. Eq. (22 N. C.) 42.

⁴⁶ In re Daly's Settlement, 25 Beav. 456; Goods of Hallyburton, L. R. 1 P. & D. 90; Topham v. Portland, 32 L. J. Ch. 257, 8 L. T. 180; Goods of Huber, (1896) P. 209; Barretto v. Young, (1900) 2 Ch. 339; Sewall v. Wilmer, 132 Mass. 131; Stone v. Forbes, 189 Mass. 163, 75 N. E. 141; Betts v. Betts, 4 Abb. N. Cas. (N. Y.) 317, 318; Bingham's Appeal, 64 Pa. St. 345; Cotting v. De Sartiges, 17 R. I. 668, 669, 16 L. R. A. 367, 24 Atl. 530.

Compare: Olivet v. Whitworth, 82 Md. 258, 33 Atl. 723, decided under statutes of that state which have since been repealed and re-enacted, but with different provisions.

As to the interpretation of the will of the donee of the power, it is controlled by the law of his domicile.—In re Hardman, (1894) 3 Ch. 613.

Where the formalities for the execution of the power of appointment are prescribed in the will of the donor of the power, the power is sufficiently executed if such formalities are complied with, although not in accord with the law of the domicile of the one exercising the power.—Goods of Alexander, 6 Jur. N. S. 354, 29 L. J. P.

93; Tatnall v. Hankey, 2 Moore P. C. C. 342.

The Statute of Wills of 1 Victoria, ch. 26, § 10, reads as follows: "No power of appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required" [manner in which wills are executed] "and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or formality." Subsequently was enacted the statute of 24 and 25 Victoria, ch. 114 (referred to as Lord Kingsdown's Act), whereby wills of British subjects disposing of personal property could be executed according to the laws of the testator's domicile at the date of execution, the laws of the place where the will was made, or the laws of the testator's domicile of origin. This latter statute does not refer to powers of appointment. In Kirwan's Trusts, 25 Ch. Div. 373, it was held that the statute last mentioned "does not at all touch or interfere with the negative provision of the Wills Act, namely,

exercising the power of appointment is not limited by the law of his domicile.⁴⁷

As to real property, since it can only be disposed of according to the law of the place where it is situated, a will executing a power of appointment to realty must comply with the requirements of the *lex situs* of the land.⁴⁸ A donation by will of a power of appointment to realty comes under the same rule.

§ 281. Recording Certified Record of the Probate of a Foreign Will.

The probate of a will in the state wherein the testator was domiciled at the time of his death, has no effect

that no testamentary appointment can be made unless it is attested by two witnesses." A holographic codicil executed in France by a testator domiciled there, and valid under the French laws, although admitted to probate in England, was held invalid as an execution of a power of appointment, because of the lack of attesting witnesses. (See § 10 of the Wills Act above quoted.) Prior to the statute of 24 and 25 Victoria, ch. 114, in the case of *D'Huart v. Harkness*, 34 Beav. 324, 34 L. J. Ch. 31, 11 Jur. (N. S.) 633, it was held that a power of appointment to personal property could be made by any will that was entitled to be admitted to probate in England, and the appointment was held valid under a will of a testator domiciled abroad and executed according to the formalities there prescribed, although not conform-

ing to the English law, and although the instrument would have been an invalid appointment if it had been executed in England. *Hummel v. Hummel*, (1898) 1 Ch. 642, followed *In re Kirwan's Trusts*, supra, and distinguished *D'Huart v. Harkness*, supra. Then two years later, *In re Price*, (1900) 1 Ch. 442, followed *D'Huart v. Harkness* and distinguished *In re Kirwan's Trusts* and *Hummel v. Hummel*.

⁴⁷ *Pouey v. Hordern*, (1900) 1 Ch. 492; *In re Megret*, (1901) 1 Ch. 547.

⁴⁸ *Pouey v. Hordern*, (1900) 1 Ch. 492; *In re Megret*, (1901) 1 Ch. 547; *Sewall v. Wilmer*, 132 Mass. 131; *Bingham's Appeal*, 64 Pa. St. 345; *Cotting v. De Sartiges*, 17 R. I. 668, 16 L. R. A. 367, 24 Atl. 530; *Blount v. Walker*, 28 S. C. 545, 6 S. E. 558.

upon land situated in another state, and for this reason statutes have been enacted in various jurisdictions providing for the probate of foreign wills, or the recording of duly authenticated copies of the probate proceedings. The general rule is that where a will has been duly admitted and probated in one state, duly certified copies of such will and of the probate proceedings may be recorded in another state the same as a domestic will, and thereafter have the same force and effect. But it may, however, be attacked on the ground that the court of the foreign jurisdiction did not have jurisdiction of the persons and subject matter affected by the decree.⁴⁹

⁴⁹ *Scott v. Herrell*, 27 App. D. C. 395; *Murdoch v. Murdoch*, 81 Conn. 681, 129 Am. St. Rep. 231, 72 Atl. 290; *Torrey v. Bruner*, 60 Fla. 365, 53 So. 337; *Sullivan v. Kenney*, 148 Iowa 361, 126 N. W. 349; *Green v. Alden*, 92 Me. 177, 42 Atl. 358; *Heard v. Drennen*, 93 Miss. 236, 46 So. 243; *Fenderson v. Missouri Tie & T. Co.*, 104 Mo. App. 290, 78 S. W. 819; *Martin v. Martin*, 70 Neb. 207, 97 N. W. 289; *In re Hagar's Will*, 48 Misc. Rep. 43, 96 N. Y. Supp. 96; *Bradley v. Krudop*, 128 App. Div. 200, 112 N. Y. Supp. 609; *Montague v. Schieffelin*, 46 Ore. 413, 80 Pac. 654; *Haney v. Gartin*, 51 Tex. Civ. 577, 113 S. W. 166; *In re Rumford's Will*, 66 W. Va. 39, 66 S. E. 10; *In re Box's Will*, 127 Wis. 264, 106 N. W. 1063; *In re Gertsen's Will*, 127 Wis. 602, 115 Am. St. Rep. 1060, 106 N. W. 1096.

Such statutes do not deprive one from proving the original will as

if such statutes had not been enacted.—*Scott v. Carter* (N. J. Eq.), 76 Atl. 1056.

A will, duly proved in another jurisdiction, or authentic copy of same, with certificate that such will was duly executed, when recorded, although not executed according to the laws of Illinois, is effectual in that state to pass title to property therein.—*Amrine v. Hamer*, 240 Ill. 572, 88 N. E. 1036; *Dibble v. Winter*, 247 Ill. 243, 93 N. E. 145.

A foreign will, to be admissible in evidence in Georgia, must be accompanied by a duly authenticated copy of the probate proceedings.—*Youmans v. Ferguson*, 122 Ga. 331, 50 S. E. 141; *Civ. Code Georgia*, 1895, §§ 5167, 5237.

Compare: *Kelly v. Moore*, 22 App. D. C. 9.

The laws of Louisiana regarding registration of foreign wills were held not to apply to the will

§ 282. Ancillary Administration.

Where some of the property of an estate is situated in a foreign state, as the jurisdiction of the court where

of a resident of that state, although executed and probated without the state.—Succession of Drysdale, 121 La. 816, 46 So. 873.

In Illinois, recording is sufficient to pass title under a foreign will, probate of the same not being required.—*Amrine v. Hamer*, 240 Ill. 572, 88 N. E. 1036; *Stull v. Veatch*, 236 Ill. 207, 86 N. E. 227.

In North Carolina, a copy of a foreign will, when duly filed, has the same force and effect as the original will.—*Roper Lumber Co. v. Hudson*, 153 N. C. 96, 68 S. E. 1065.

A certified copy of a will sought to be recorded is presumed to be a true copy of the original and if on its face it shows that it is not sufficient to pass property in the state wherein it is sought to be recorded and admitted, it will be rejected unless this presumption is overcome by evidence.—*Hosler v. Haines*, 7 Ohio C. C. (N. S.) 261; *In re Hagar's Will*, 48 Misc. Rep. 43, 96 N. Y. Supp. 96.

After the earthquake and fire in San Francisco, during which the original probate records were all destroyed, such records were restored, under the California law, by copies and the like, and given the effect of the originals. A duly authenticated copy of such a restored record was accepted in

Texas.—*Gordon v. Lewis* (Tex. Civ. App.), 133 S. W. 927.

Section 905 of the Revised Statutes of the United States reads, in part, as follows: "The record and judicial proceedings of the courts of any state or territory, or of any such territory, or of any such country, shall be proved and admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form and the said record and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

Although the United States Revised Statutes, § 905, prescribe the manner of certification or authentication of judicial proceedings in a foreign state, yet a state may accept, if it is satisfied in doing so, proof which is less than that stated in the statute.—*Willock v. Wilson*, 178 Mass. 68, 59 N. E. 757; *Wells Fargo & Co. v. Davis*, 105 N. Y. 670, 12 N. E. 42; *Hewit v. Bank of Indian Territory*, 64 Neb. 463, 90 N. W. 250, 92 N. W. 741; *Title Guarantee &*

the original will is admitted to probate is confined within its borders, ancillary letters of administration are gener-

Trust Co. v. Trenton Potteries Co., 56 N. J. Eq. 441, 38 Atl. 422.

A state has no authority to require additional formalities than those prescribed by the United States statute.—*Ritchie v. Carpenter*, 2 Wash. 512, 26 Am. St. Rep. 877, 28 Pac. 380.

In *Sullivan v. Kenney*, 148 Iowa 361, 126 N. W. 349, the court says: "It will be found that a number of courts sustain the views . . . that a foreign judgment can not be attacked for want of jurisdiction where the foreign court expressly finds that jurisdiction does exist. But that is not the rule in this state, nor is it the one sustained by the weight of authority."

To the same effect, see: *Overby v. Gordon*, 177 U. S. 214, 44 L. Ed. 741, 20 Sup. Ct. 603; *Stark v. Parker*, 56 N. H. 481, involving the question of the domicile of the testator; *Pennywit v. Foote*, 27 Ohio St. 600, 22 Am. Rep. 340, where it was held that lack of jurisdiction in the foreign tribunal could be shown to exist and the record be held a nullity, notwithstanding its recitals; *Bate v. Incisa*, 59 Miss. 513, where it was held that Mississippi, being the domicile of the testator, his capacity to make the will must be adjudged by the laws of that state.

That § 905 of the Revised Statutes does not preclude the objec-

tion in one state of the record of a judgment from another state, that there was a lack of jurisdiction of person or subject-matter, see, generally: *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 32 L. Ed. 239, 8 Sup. Ct. 1370; *Davis v. Bessemer City Cotton Mills*, 178 Fed. 784, 102 C. C. A. 232; *Foster Milburn Co. v. Chinn*, 202 Fed. 175, 122 C. C. A. 577; *Flexner v. Farson*, 268 Ill. 435, Ann. Cas. 1916D 810, 109 N. E. 327; *Marshall v. R. M. Owen & Co.*, 171 Mich. 232, 137 N. W. 204; *De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705; *Wood v. Augustins*, 70 Vt. 637, 41 Atl. 583.

Nor that the judgment was obtained by fraud: *Rose v. Northwest Fire & M. Ins. Co.*, 67 Fed. 439.

Authenticated copies of a foreign will and of the proceedings of probate of the same, duly recorded in Illinois, can not be collaterally attacked unless the record, on its face, shows the will to have been improperly admitted.—*Stull v. Veatch*, 236 Ill. 207, 86 N. E. 227.

To the same effect: *Stevens v. Oliver*, 200 Mo. 492, 98 S. W. 492.

In *Torrey v. Bruner*, 60 Fla. 365, 53 So. 337, the court says: "When a court does not have jurisdiction of the subject-matter and of the parties affected by its judgment or decree, the adjudication is void, and may be assailed collaterally.

ally issued in the other state for the purpose of administering the property therein. Such proceedings are usually instituted by filing or recording certified copies of the original will and of the proof thereof and proceedings thereunder. Such ancillary administration merely settles questions as to the authenticity of the will, but does not affect the distribution thereunder,⁵⁰ vesting only the bare legal title in the administrator.⁵¹ In some jurisdic-

But, if the court has jurisdiction of the subject-matter and of the parties, the adjudication is binding, even though erroneous, unless it is reversed or modified by direct appellate proceedings. When the court has jurisdiction of the subject-matter and of some of the parties, the adjudication may be binding on the parties over whom the court has acquired jurisdiction . . . , and not binding as to other persons over whom the court has not acquired jurisdiction. In proceedings in rem, where proper notice is given, the adjudication is in general binding on all the world, where the court had jurisdiction of the subject-matter of the rem. The probate of a will is in the nature of a proceeding in rem. . . . The subject-matter of the proceedings or the rem is the will."

It has been held in Vermont that a will duly probated in the state where the property lies, can not be attacked in the place of domicile, on the ground of incapacity and undue influence.—*Ives v. Salisbury's Heirs*, 56 Vt. 565.

In *Barnes v. Brownlee*, 97 Kan. 517, 155 Pac. 962, the court says: "The claims that jurisdiction was acquired by fraud and that the judgment probating the will was induced by false testimony were matters inherent in the action that were investigated and determined by that court, and it is well settled that such a determination is not open to collateral attack."

Compare: *Ball v. Reese*, 58 Kan. 614, 62 Am. St. Rep. 638, 50 Pac. 875.

⁵⁰ *Thornton v. Curling*, 8 Sim. 310.

⁵¹ *Tompkins v. Tompkins*, 1 Story (U. S. C. C.) 547, 554, Fed. Cas. No. 14091; *Ex parte Fuller*, 2 Story (U. S. C. C.) 327, 328, Fed. Cas. No. 5147; *Laughton v. Atkins*, 1 Pick. (Mass.) 535, 548; *Dublin v. Chadbourn*, 16 Mass. 433.

When a will of one domiciled in a foreign country has been admitted to probate there, it is customary to grant ancillary administration in the jurisdiction where the property lies, without permitting inquiry into the grounds of the foreign proceeding.—*Miller v. James*, L. R.

tions, statutes have been enacted making foreign executors or administrators subject to suit by persons who have claims against the estate,⁵² providing, of course, that the local court acquires jurisdiction of the person of the defendant or the property of the estate. But the general rule, in the absence of statutory authority, is that one who has a claim to certain personal property of a decedent, either by will or under the laws of succession, can enforce the same only in and according to the laws of the forum where the will has been admitted to probate or the estate is being administered; such a claim can not be enforced in another jurisdiction unless the will is proved there or ancillary administration is had. The validity, however, of such claim to personal property, is governed by the law of the domicile of the decedent at the time of his death.⁵³

3 P. & D. 4; *In re Goods of Earl*, L. R. 1 P. & D. 450; *Hare v. Nasmyth*, 2 Addams 25; *In re Read*, 1 Hagg. Ecc. 474.

⁵² *Johnson v. Jackson*, 56 Ga. 326, 21 Am. Rep. 285; *Cady v. Bard*, 21 Kan. 667; *Williams' Admrs. v. Welton's Admr.*, 28 Ohio St. 451, 464.

⁵³ *Flood v. Patterson*, 29 Beav. 295; *Lowe v. Farlie*, 2 Madd. 101; *Vaughan v. Northup*, 15 Pet. (U. S.) 1, 10 L. Ed. 639; *Kerr v. Moon*, 9 Wheat. (U. S.) 565, 6 L. Ed. 161; *Fleeger v. Poole*, 1 McLean (U. S.) 185, 189, Fed. Cas. No. 4860; *Hatchett v. Berney*, 65 Ala. 39; *King v. Martin*, 67 Ala. 177; *Russell v. Hooker*, 67 Conn.

24, 35 L. R. A. 495, 34 Atl. 711; *Sloan v. Sloan*, 21 Fla. 589; *Snyder v. Hochstetler*, 88 Iowa 621, 55 N. W. 573; *Embry v. Millar*, 1 A. K. Marsh. (8 Ky.) 300, 302, 10 Am. Dec. 732; *Borden v. Borden*, 5 Mass. 67, 4 Am. Dec. 32; *Richards v. Dutch*, 8 Mass. 506; *Van Dyke v. Van Dyke*, 36 N. J. Eq. 521, 523; *Cocks v. Varney*, 42 N. J. Eq. 514, 8 Atl. 722; *Durie v. Blauvelt*, 49 N. J. L. 114, 6 Atl. 312; *Flandrow v. Hammond*, 13 App. Div. (N. Y.) 325, 43 N. Y. Supp. 143; *Lyon v. Park*, 111 N. Y. 350, 18 N. E. 863; *Hopper v. Hopper*, 125 N. Y. 400, 12 L. R. A. 237, 26 N. E. 457; *Muselman's Appeal*, 101 Pa. St. 165; *Carr v. Lowe's Exrs.*, 7 Heisk. (Tenn.) 84.

§ 283. Charitable Devises and Bequests: Perpetuities: By Which Law Governed.

A testator by his will may donate a portion of his estate to a charitable institution or direct that the same be conserved and the accumulations be used for designated purposes. The universal rule is that the validity of a devise of real property for any purpose, as against the heir at law, depends upon the law of the *situs* of the property.⁵⁴ As to bequests of personal property there is a conflict of decisions. Should a testator, domiciled in one jurisdiction, leave a legacy to a charitable institution organized and existing in another state, but which is not authorized by law to receive the gift, or directs that his property be accumulated and administered in another state in a manner which violates the rule as to perpetuities in that jurisdiction, the question arises as to what law controls, that of the state of the testator's domicile, or that of the jurisdiction where the property is to be distributed or administered.

⁵⁴ A charitable devise of real property is governed by the law of the *situs*.—Curtis v. Hutton, 14 Ves. Jun. 537; Duncan v. Lawson, 41 Ch. Div. 394; Vidal v. Philadelphia, 2 How. (U. S.) 127, 11 L. Ed. 205; Wheeler v. Smith, 9 How. (U. S.) 55, 13 L. Ed. 44; McDonogh v. Murdoch, 15 How. (U. S.) 367, 14 L. Ed. 732; Jones v. Habersham, 107 U. S. 174, 27 L. Ed. 401, 2 Sup. Ct. 336; Handley v. Palmer, 103 Fed. 39, 43 C. C. A. 100; Brigham v. Peter Bent Brigham Hospital, 126 Fed.

796; Butler v. Green, 16 N. Y. Supp. 888; In re Stewart's Estate, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723.

As to the rule against perpetuities, a devise of real property is governed by the law of the *situs*.—Ford v. Ford, 80 Mich. 42, 44 N. W. 1057; White v. Howard, 46 N. Y. 144; Hobson v. Hale, 95 N. Y. 588; Penfield v. Tower, 1 N. D. 216, 46 N. W. 413; Ford v. Ford, 70 Wis. 19, 5 Am. St. Rep. 117, 33 N. W. 188.

The rule most favored is that in all such cases the law which governs is that of the domicile of the testator.⁵⁵ If the courts of the domicile determine the bequest to be valid under its law, it is no part of their duty to administer the fund in another jurisdiction nor to determine whether or not the charitable purpose might legally be carried out. They merely direct that the moneys be transferred to the proper parties, leaving the courts of the other state to provide for the proper application of the legacy.⁵⁶

§ 284. The Same Subject: Illustration of the General Rule.

A will by its residuary clause gave all the remainder of the property of the testator to the city of Winchester

⁵⁵ Duggan v. Slocum, 83 Fed. 244; Handley v. Palmer, 103 Fed. 39, 43 C. C. A. 100; Philadelphia Baptist Assn. v. Hart, 4 Wheat. (U. S.) 1, 4 L. Ed. 499; Healy v. Reed, 153 Mass. 197, 10 L. R. A. 766, 26 N. E. 404; Jenkins v. Guarantee Trust etc. Co., 53 N. J. Eq. 194, 32 Atl. 208; Butler v. Green, 16 N. Y. Supp. 888; Dammert v. Osborn, 140 N. Y. 30, 35 N. E. 407; Temple v. Board of Comrs. of Pasquotank Co., 111 N. C. 36, 15 S. E. 886.

As to the rule against perpetuities, bequests or personalty are governed by the law of the domicile of the testator, irrespective of the situs of the property.—Heywood v. Heywood, 29 Beav. 9; Whitney v. Dodge, 105 Cal. 192, 38 Pac. 636; White v. Howard, 46 N. Y. 144; Cross v. United States Trust Co., 131 N. Y. 330, 27 Am.

St. Rep. 597, 15 L. R. A. 606, 30 N. E. 125; Ford v. Ford, 70 Wis. 19, 5 Am. St. Rep. 117, 33 N. W. 188.

⁵⁶ Provost of Edinburgh v. Aubrey, Ambler 236; Attorney-General v. Lapine, 2 Swanst. 181; Burbank v. Whitney, 24 Pick. (Mass.) 146, 154, 35 Am. Dec. 312.

See following, notes 57, 58, 60.

The statutory limitations in one state upon the amount which may be bequeathed from a husband, wife or child to a charitable institution, do not affect the bequest of a testator domiciled out of the state made to such an institution within the state.—Crum v. Bliss, 47 Conn. 592.

If a trust for a charitable purpose is valid, by the law of the testator's domicile, if made to a municipal corporation which is incompetent to execute the trust,

in Virginia, "to be accumulated by such city for the period of twenty years, the income arising from said residue estate to be expended and laid out in said city by the erection of school-houses for the education of the poor." The testator was a citizen of Pennsylvania and died there. In determining the case, the court says: "It is clear that, as respects all the testator's personal estate and his real estate situated in the state of Pennsylvania, the validity of the residuary clause is to be determined by the law of Pennsylvania; the testator's domicile having been there at the date of his will and at the time of his death." The property involved was personal property. The claim was made that the validity of the residuary clause should be determined by the laws of Virginia. Under the laws of Pennsylvania a municipal corporation could accept such a bequest. In this respect, the court says: "Judged by the law of Pennsylvania, then, the objection to the competency of the city of Winchester to take the bequest or execute the trust under the residuary clause of this will is without force. If, however, for any reason, the city of Winchester is incompetent to execute the trust, the law of the testator's domicile would not suffer his charitable intentions to be thereby defeated, but would supply a trustee. Both by the common law and the statute law of Pennsylvania a charitable gift is not to fail because given to a person or corporation incapable of taking it and administering the trust, but a competent trustee for the purpose will be appointed by the court."⁵⁷

the state only could object to the want of capacity.—*Vidal v. Philadelphia*, 2 How. (U. S.) 127, 11 L. Ed. 205.

⁵⁷ *Handley v. Palmer*, 91 Fed. 948.

See, also, *Frazier v. St. Luke's Church*, 147 Pa. St. 256, 23 Atl.

§ 285. The Same Subject: To the Contrary.

Some decisions hold that where a will, valid for all purposes under the law of the domicile of the testator, contains a bequest of moneys to be transmitted to or administered in another state, the validity of such bequest is to be determined by the law of the state where the moneys are to be received or administered.⁵⁸ Thus a

442, wherein the court says: "A gift to the lame, the halt, and the blind, is not to fail in the nineteenth century, because the legal title is given to a person or corporation incapable of taking it, or even forbidden by law to take it. Chancery here steps in to enforce the charity, and commits it to some one who may lawfully administer it."

In *Iglehart v. Iglehart*, 26 App. D. C. 209, the court says: "We do not think it necessary to here pass upon the question whether the cemetery company has power, under its charter, to act as trustee, . . . for the reason that equity will not allow the trust to fail for want of a trustee, but will, if necessary, appoint a trustee to carry it into effect."

In *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. 407, in dealing with a charitable bequest valid under the law of the testator's domicile, the court says: "Our courts may in certain cases decline to administer the gift, and remit the property to the principal seat of administration, but they can not divest the title of one or transfer it

to another contrary to the law of the domicile. That law is part of the disposition and the foundation of all title under it, and it can not be disregarded to the prejudice of one and the benefit of another any more than the other parts of the instrument. There is no law which forbids gifts to charities here by testators in other countries, or that require us to reject the gift unless it is made, in all respects, in conformity with our local law."

⁵⁸ *Sickles v. City of New Orleans*, 80 Fed. 868, 26 C. C. A. 204; *Chamberlain v. Chamberlain*, 43 N. Y. 424.

In *Hobson v. Hale*, 95 N. Y. 588, it was held that a devise by a resident of Massachusetts of real property in New York, valid under the Massachusetts law but in violation of the rule against suspending the power of alienation in New York, should be construed according to the law of the situs.

In *Chamberlain v. Chamberlain*, 43 N. Y. 424, the court, at p. 433, says: "But if, within the *lex domicilii*, a will has all the forms and requisites to pass the title to per-

testator, domiciled and dying in New York, executed his will less than a month before his death, and in his will among other things made a bequest of personal property to certain charitable institutions in Pennsylvania,

sonalty, the validity of the particular bequests will depend upon the law of the domicile of the legatee and of the government to which the fund is by the terms of the will to be transmitted for administration." The court then states that a bequest, if valid by the law of the domicile of the legatee, will be held valid irrespective of the law of the testator's domicile unless the law prohibits bequests for the purpose named or limits the capacity of the testator in disposing of his property, in which last instances the bequest will be held void everywhere. In the same case, the court also says: "The courts of this state will not administer a foreign charity, but they will direct the money devoted to it to be paid over to the proper parties, leaving it to the courts of the state within which the charity is to be established, to provide for its due administration and for the proper application of the legacy."

To the same effect, see: *Hope v. Brewer*, 136 N. Y. 126, 18 L. R. A. 458, 32 N. E. 558; *Stieglitz v. Attorney General*, 91 Misc. Rep. 139, 154 N. Y. Supp. 137.

See, also, *Hollis v. Drew Theological Seminary*, 95 N. Y. 166.

Chamberlain v. Chamberlain,

supra, was limited and distinguished in *Cross v. United States Trust Co.*, 131 N. Y. 330, 27 Am. St. Rep. 597, 15 L. R. A. 606, 30 N. E. 125.

In *Succession of Petit*, 49 La. Ann. 625, 62 Am. St. Rep. 650, 21 So. 717, the law of the testator's domicile was not recognized as controlling the disposition of personal property in Louisiana where a different law prevailed, the court saying: "In this class of cases, and others in which there is no right affecting our own citizens, or repugnant to our law and public policy, our courts will give effect to the foreign law, in subjecting to its operation movable property here. . . . We are not at liberty in this case to enforce the foreign law, because, in our view, the comity of states does not exact the recognition by the courts of one country of the title of an heir based on a foreign law opposed to our law, and detrimental to our citizens, if enforced."

A bequest by a citizen of Connecticut to an unincorporated association in New York, although valid under the Connecticut law, was held ineffective because void under the law of New York.—*Mapes v. American Home Missionary Soc.*, 33 Hun (N. Y.) 360.

none of his property, however, being in that state. Under the law of Pennsylvania, a charitable bequest contained in a will was invalid unless the will had been executed at least a month before the death of the testator. It was held that since the bequest was void under the laws of Pennsylvania, it was void in New York.⁵⁹

§ 286. The Same Subject: Purpose of Statutes Explained.

In a later case in New York, a testator who had been domiciled in Peru, but whose property was largely in the state of New York, provided in his will for the establishment in New York City of a home for poor children. Objection was made that the will violated the rule as to perpetuities and also the statute of New York prescrib-

⁵⁹ *Carter v. Board of Education*, 68 Hun (N. Y.) 435, 436, 23 N. Y. Supp. 95.

Compare: *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. 407.

Where a church was prohibited from receiving a devise of lands by the laws of the state wherein the property was situated, such a devise was held void and against public policy, and could not be ratified or made effectual by any act of persons holding adverse interests.—*Miller v. Ahrens*, 163 Fed. 870.

Such devise being void, no acts on the part of the heir would estop him from thereafter contesting it.—*Miller v. Ahrens*, *supra*; *Lyons v. Barnum*, 60 Misc. Rep. 625, 112 N. Y. Supp. 587.

The statutes of California pro-

vide that a will executed outside of that state, if valid under the law of the testator's domicile, will be valid in California as to personal property, except that charitable bequests and devises are limited to one-third of the amount of the testator's estate. This rule is under an amendment of the California law in 1905, prior to that time the rule being "that in the absence of a positive law to the contrary, disposition of the decedent's personal estate will be governed by the law of his actual domicile." But since the amendment to the California law it has been held that charitable bequests in foreign wills shall be governed by the same rules which control such bequests in domestic wills in California.—*In re Lathrop's Estate*, 165 Cal. 243, 131 Pac. 752.

ing the length of time prior to death that a devise to charity could be validly made. The court held that such laws did not apply to testamentary gifts made by those domiciled elsewhere, if such gifts were valid under the law of the domicile of the testator. The court says: "The purpose of these statutes is evident. They were intended to prevent improvident and hasty bequests to the prejudice or neglect of those natural obligations which the law also imposes upon the citizen. But these obligations applied to members of the political community from which the law emanated and not to persons in other countries where no such restrictions existed, and who desired to give according to their own laws. Bequests by such persons to those corporations, without regarding the statutes referred to, would be good if valid at the domicile of the testator. It is no part of our public policy to condemn such gifts to charitable or benevolent corporations here. Our law permits the citizens or subjects of other countries to dispense charity here in such measure as they wish and according to such methods as their own laws prescribe. The policy that dictated our statutes against perpetuities and accumulations did not anticipate any danger from abroad, and our recent decisions are to the effect that they are local in their scope and effect."⁶⁰

⁶⁰ *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. 407, reviews former cases, the court saying: "The trend of these cases is unquestionably toward the conclusion that our statutes apply to domestic wills that by their provisions are to be executed here. An accumulation to take effect in another

country or a bequest made there to take effect here was not within the intention of the legislature when these statutes were framed."

To the same effect: *Mount v. Tuttle*, 99 App. Div. 433, 91 N. Y. Supp. 195.

In *Cross v. United States Trust Co.*, 131 N. Y. 330, 27 Am. St. Rep.

§ 287. Taxes Upon the Right to Acquire Property by Will or Under the Laws of Succession.

In most jurisdictions statutes have been enacted imposing an inheritance or succession tax or excise upon the right to acquire property by devise, bequest, under the laws of succession, or under a gift which does not take effect until the death of the donor. Such a tax is, strictly speaking, not a property tax, but a charge imposed upon the right or privilege of acquiring, in the manner mentioned, the property of a decedent.⁶¹ Such a

597, 15 L. R. A. 606, 30 N. E. 125, where the question involved was the validity of a will of personal property by a resident of Rhode Island to a New York corporation in trust for the purpose of collecting and receiving the income thereof, which it was claimed violated the rule as to perpetuities in New York, it was held that the will had to be construed according to the laws of Rhode Island. The case of *Chamberlain v. Chamberlain*, 43 N. Y. 424, was distinguished. Then following, in the case of *Hope v. Brewer*, 136 N. Y. 126, 18 L. R. A. 458, 32 N. E. 558, the case of *Cross v. United States Trust Co.*, *supra*, was limited, it being held that a charitable bequest by a resident of New York to trustees in a foreign jurisdiction, if valid under the foreign law, will be held valid in New York, although it might be assumed to be void under the law of that state. Both cases were limited and explained in *Dammert v. Osborn*, *supra*.

It was held that a restriction upon bequests to corporations in New York did not apply to legacies to corporations created under the laws of another state where no such limitation existed, even though the will was executed in New York.—*Riley v. Diggs*, 2 Dem. (N. Y.) 184.

In *Girard v. Philadelphia*, 7 Wall. (U. S.) 1, 19 L. Ed. 53, the court says: "Nor can a valid vested estate in trust lapse or become forfeited by any misconduct in the trustee, or inability in the corporation to execute it, if such existed. Charity never fails; and it is the right, as well as the duty, of the sovereign, by its courts and public officers, as also by its legislature (if needed), to have the charities properly administered."

To the same effect, see: *City of Philadelphia v. Fox*, 64 Pa. St. 169.

⁶¹ *Blythe v. Granville*, 13 Sim. 195; *Lyll v. Lyall*, L. R. 15 Eq. 11; *Wallace v. Attorney General*, L. R. 1 Ch. App. 1; *In re Badart's Trust*,

tax may legally be levied upon both real and personal property, wherever the same may be found or jurisdiction of its disposition acquired, even though the law of the *situs* of the property be governed by the law of the domicile; and even though the law of the domicile, viewing the chattels of the decedent, wheresoever situated, as under its control, imposes a charge upon the succession to them, although a similar tax is imposed in the jurisdiction of their *situs*. The fact that two states impose taxes upon either similar or upon inconsistent principles because of the transfer of the same chattel, although it may result in hardship, is not in con-

- L. R. 10 Eq. 296; *United States v. Perkins*, 163 U. S. 625, 41 L. Ed. 287, 16 Sup. Ct. 1073; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. Ed. 1037, 18 Sup. Ct. 594; *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. 747; *Plummer v. Coler*, 178 U. S. 115, 44 L. Ed. 998, 20 Sup. Ct. 829; *Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 439, 23 Sup. Ct. 277; *In re Hite's Estate*, 159 Cal. 392, Ann. Cas. 1912C 1014, 32 L. R. A. (N. S.) 1167, 113 Pac. 1072; *People v. Griffith*, 245 Ill. 532, 92 N. E. 313; *Minot v. Winthrop*, 162 Mass. 113, 26 L. R. A. 259, 38 N. E. 512; *In re Fox's Estate*, 154 Mich. 5, 117 N. W. 558; *Dixon v. Russell*, 79 N. J. L. 490, 76 Atl. 982; *In re Cummings' Estate*, 142 App. Div. 377, 127 N. Y. Supp. 109; *In re Kenney's Estate*, 194 N. Y. 281, 87 N. E. 428; *In re McKennan's Estate*, 27 S. D. 136, Ann. Cas. 1913D 745, 33 L. R. A. (N. S.) 620, 130 N. W. 33; *In re Stixrud's Estate*, 58 Wash. 339, Ann. Cas. 1912A 850, 33 L. R. A. (N. S.) 632, 109 Pac. 343; *In re Bullen's Estate*, 143 Wis. 512, 139 Am. St. Rep. 1114, 128 N. W. 109.
- Where a legacy is given to some institution whose property is exempt from taxation, as for instance a church, ordinarily such legacies are exempt from inheritance or succession taxes.—*Carter v. Eaton*, 75 N. H. 560, 78 Atl. 643; *Carter v. Story*, 76 N. H. 34, 78 Atl. 1072; *In re Lyon's Estate*, 144 App. Div. 104, 128 N. Y. Supp. 1004; *Lacy v. State Treasurer (Iowa)*, 121 N. W. 179; *Estate of Macky*, 46 Colo. 79, 23 L. R. A. (N. S.) 1207, 102 Pac. 1075.
- But see: *In re Gopsill's Estate*, 77 N. J. Eq. 215, 77 Atl. 793; *In re Moses*, 138 App. Div. 525, 123 N. Y. Supp. 443.

travention to the rules of constitutional law.⁶² And the law in force at the death of the testator or intestate, which fixes the liability for the tax.⁶³

⁶² *Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 439, 23 Sup. Ct. 277.

See, also: *Mager v. Grima*, 8 How. (U. S.) 490, 12 L. Ed. 1168; *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. 475; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 22, 35 L. Ed. 613, 11 Sup. Ct. 876; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 42 L. Ed. 1037, 18 Sup. Ct. 594; *New Orleans v. Stempel*, 175 U. S. 309, 44 L. Ed. 174, 20 Sup. Ct. 110; *Bristol v. Washington County*, 177 U. S. 133, 44 L. Ed. 701, 20 Sup. Ct. 585; *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. 747; *Eidman v. Martinez*, 184 U. S. 578, 46 L. Ed. 697, 22 Sup. Ct. 515.

The fact that a deposit in the bank was taxed in Montana and also by the federal government, was held no objection in New York to also imposing a transfer tax by that state.—*Matter of Daly's Estate*, 100 App. Div. 373, 91 N. Y. Supp. 858; affirmed 182 N. Y. 524, 74 N. E. 1116.

⁶³ *Commonwealth v. Stoll's Admr.*, 132 Ky. 234, 114 S. W. 279, 116 S. W. 687; *Pierce v. Stevens*, 205 Mass. 219, 91 N. E. 319; *Carter v. Whitcomb*, 74 N. H. 482, 17 L. R. A. (N. S.) 733, 69 Atl. 779.

There is some conflict, arising from the construction of the various statutes, as to when the prop-

erty, where contingencies exist, may be taxed. These matters are often covered by the statute, but where there is no direction on the subject, contingent estates are generally held not taxable until the contingency has arisen and the estate has vested.—*Billings v. People*, 189 Ill. 472, 59 L. R. A. 807, 59 N. E. 798; *Howe v. Howe*, 179 Mass. 546, 55 L. R. A. 626, 61 N. E. 225; *Matter of Stewart*, 131 N. Y. 274, 14 L. R. A. 836, 30 N. E. 184; *Matter of Roosevelt's Estate*, 143 N. Y. 120, 25 L. R. A. 695, 38 N. E. 281; *Estate of Cox*, 193 Pa. St. 100, 44 Atl. 256; *State v. Pabst*, 139 Wis. 561, 121 N. W. 351.

But if the estate vests in the successor or beneficiary at the death of the decedent owner or testator, the tax accrues as of that date.—*Ayers v. Chicago Title etc. Co.*, 187 Ill. 42, 58 N. E. 318; *Matter of Dow's Estate*, 167 N. Y. 227, 88 Am. St. Rep. 509, 52 L. R. A. 433, 60 N. E. 439; *Commonwealth v. Smith*, 20 Pa. St. 100; *Mellon's Appeal*, 114 Pa. St. 564, 8 Atl. 183; *Lines' Estate*, 155 Pa. St. 378, 26 Atl. 728.

Where a non-resident is the residuary legatee under the will of a resident decedent, but such beneficiary dies before the executors have made their accounting and before the property which would

§ 288. The Same Subject: Real Property: When Converted Into Personalty.

As to real property, the rule is that the law of a state can impose an inheritance or succession tax only upon such property as is actually within its borders; and as to such property the assessment is made irrespective of the domicile of either the decedent or the beneficiary.⁶⁴

pass under the residuary legacy has been ascertained, no transfer tax can be imposed; the mere right to the legacy not being deemed as being property within the state.—*Matter of Phipps*, 77 Hun 325, 28 N. Y. Supp. 330, affirmed 143 N. Y. 641, 37 N. E. 823; *Matter of Zefita*, *Countess de Rohan-Chabot's Estate*, 167 N. Y. 280, 60 N. E. 598.

But where the accounting has been had and the amount of property passing under the residuary clause has been determined, the tax will be imposed.—*Matter of Clinch's Estate*, 180 N. Y. 300, 73 N. E. 35.

"Property within the state" was held to include an undivided quarter interest in the personal estate of a decedent who had been domiciled in Maryland, which interest passed to a non-resident, and consisted of national bank stock, Missouri state bonds, and the like. The non-resident receiving the benefits died before distribution. His estate was administered in California, and letters of administration, with the will annexed, were taken out in Mary-

land. The interest in the estate of the first decedent was held subject to the tax. The court said, in effect, that to tax property passing to residents and not to tax property passing to non-residents would be a discrimination against the citizens of the state.—*State v. Dalrymple*, 70 Md. 294, 3 L. R. A. 372, 17 Atl. 82.

Where a non-resident decedent died intestate leaving personal property situated in the state of his domicile and which passed to a sister domiciled in Pennsylvania, the sister dying before receiving the property, her interest in the estate of her non-resident decedent brother was held subject to the tax, the theory being that her right to the property vested at the brother's death, he dying intestate.—*Milliken's Estate*, 206 Pa. St. 149, 55 Atl. 853.

⁶⁴ *Connell v. Crosby*, 210 Ill. 380, 71 N. E. 350; *Weaver's Estate v. State*, 110 Iowa 328, 81 N. W. 603; *Lorillard v. People*, 6 Dem. (N. Y.) 268, 19 N. Y. St. Rep. 263; *Matter of Swift*, 137 N. Y. 77, 18 L. R. A. 709, 32 N. E. 1096; *In re Speers*, 6 Ohio Dec. 398;

Real property, however, may in some cases be considered as personalty. Where a will provides that the executors shall dispose of the real estate and convert it into money, the proceeds to go to certain beneficiaries, for the purposes of an inheritance or succession tax the real estate is deemed to have been money at the death of the testator.⁶⁵

Commonwealth v. Coleman's Admr., 52 Pa. St. 468, *Drayton's Appeal*, 61 Pa. St. 172; *Miller v. Commonwealth*, 111 Pa. St. 321, 2 Atl. 492; *In re Bittinger's Estate*, 129 Pa. St. 338, 18 Atl. 132; *In re Hale's Estate*, 161 Pa. St. 181, 28 Atl. 1071; *In re Handley's Estate*, 181 Pa. St. 339, 37 Atl. 587.

⁶⁵ "The real estate having been directed by the will to be converted into money, it is to be regarded for all the purposes of this case as if it were money at the time of the death of the testator."—*Cropley v. Cooper*, 19 Wall. (U. S.) 167, 22 L. Ed. 109.

See, also, *Fairly v. Kline*, 3 N. J. L. 754, 4 Am. Dec. 414; *Wurts Exrs. v. Page*, 19 N. J. Eq. 365; *Hocker v. Gentry*, 3 Metc. (Ky.) 463; *Tazewell v. Smith*, 1 Rand. (Va.) 313, 10 Am. Dec. 533; *Bright's Appeal*, 100 Pa. St. 602; *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103.

Where the will provides that the executors shall dispose of the real estate, collect all claims, and use the proceeds for the benefit of a certain charity, it is in effect a bequest of money.—*Sickles v.*

City of New Orleans, 80 Fed. 868, 26 C. C. A. 204.

See, also, *Handley v. Palmer*, 91 Fed. 948; *Thornton v. Hawley*, 10 Ves. Jun. 129; *Stagg v. Jackson*, 1 N. Y. 206; *Dodge v. Pond*, 23 N. Y. 69; *Chamberlain v. Chamberlain*, 43 N. Y. 424.

"A testamentary gift of money, which is to be realized from the sale of land, is throughout a legacy of money, because it was the intention of the testator to give the money and not the land. . . . In other words, the land is considered as money so far as this is necessary to give effect to the provisions as a legacy of money, and to treat the interest of the legatee as altogether an interest in money."—*Allen v. Watts*, 98 Ala. 384, 11 So. 646.

The rule has been somewhat qualified in Pennsylvania, it being held that if a testator expressly directs that a certain portion of his real estate be sold and the proceeds distributed, the conversion of the realty into personalty takes effect as of the time of the testator's death and the proceeds are subject to the tax.—*Miller v.*

§ 289. The Same Subject: As to Transfers Under a Power of Appointment.

The appointee under a power of appointment by the will of the donee of the power, as we have before shown, takes under the grantor of the power.⁶⁶ Yet for the purpose of an inheritance or succession tax, the transaction is generally viewed as though the appointee acquired his interest directly from the donee of the power and the tax is imposed accordingly.⁶⁷ But where the exercise of the power of appointment effects no change in the

Commonwealth, 111 Pa. St. 321, 2 Atl. 492; Dundas' Appeal, 64 Pa. St. 325; Roland v. Miller, 100 Pa. St. 47; Estate of Williamson, 153 Pa. St. 508, 26 Atl. 246; Estate of Coleman, 159 Pa. St. 231, 28 Atl. 137.

But if the right to sell the real estate is merely permissive or, although expressly directed, is not to be sold until some future time, the character of the real property is not changed until the time of the actual sale and conversion into personalty.—Miller v. Commonwealth, 111 Pa. St. 321, 2 Atl. 492; Estate of Hale, 161 Pa. St. 181, 28 Atl. 1071; In re Handley's Estate, 181 Pa. St. 339, 37 Atl. 587.

Where a testator, in his will, directed his executors to sell his land in Pennsylvania, the proceeds of such sale were not subject to the inheritance tax in Pennsylvania. The domicile of the decedent testator determines the tax.—In re Shoenberger's Estate, 221 Pa. 112, 128 Am. St. Rep. 737,

19 L. R. A. (N. S.) 290, 70 Atl. 579.

The conversion of realty into personalty after the death of the owner would not alter the rule that the inheritance or succession tax can be imposed by a state only on real property actually within its borders.—Custance v. Bradshaw, 4 Hare 315; Weaver's Estate v. State, 110 Iowa 328, 81 N. W. 603; Matter of Swift, 137 N. Y. 77, 18 L. R. A. 709, 32 N. E. 1096.

Compare: Attorney-General v. Lomas, L. R. 9 Ex. 29; Forbes v. Steven, L. R. 10 Eq. 178; Attorney-General v. Brunning, 8 H. L. Cas. 243.

⁶⁶ See, ante, § 280.

⁶⁷ Fisher v. State, 106 Md. 104, 66 Atl. 661; In re Lowndes Estate, 60 Misc. Rep. 506, 113 N. Y. Supp. 1114; In re Kissel's Estate, 65 Misc. Rep. 443, 121 N. Y. Supp. 1088; In re Fearing's Estate, 138 App. Div. 881, 123 N. Y. Supp. 396; People v. Williams, 69 Misc. Rep. 402, 127 N. Y. Supp. 749;

devise as originally made, as, for instance, where a remainder was created under the will of the donor of the power, but granting a power of appointment under which the donee of the power could alter the devise, if the power is exercised so that no change is effected in the original devise, no tax will be levied under the will of the donee of the power.⁶⁸

§ 290. The Same Subject: The Rule That Personal Property Follows the Owner, Not Controlling.

The decisions as to inheritance or succession taxes regarding personal property are very conflicting. The stat-

Matter of Dows, 167 N. Y. 227, 88 Am. St. Rep. 509, 52 L. R. A. 433, 60 N. E. 439; In re Cooksey's Estate, 182 N. Y. 92, 74 N. E. 880; In re Fearing's Will, 200 N. Y. 340, 93 N. E. 956.

See, also, Commonwealth v. Stoll's Admr., 132 Ky. 234, 114 S. W. 279, 116 S. W. 687.

In Re Warren's Estate, 62 Misc. Rep. 444, 116 N. Y. Supp. 1034, it was held that where an appointment is made by will under a power, and the will must be resorted to in order to establish the right of the appointee to the property, the transfer was effected by the will and was subject to the transfer tax.

In Re Cooksey's Estate, 182 N. Y. 92, 74 N. E. 880, it was held that where the will of a father gave his daughter the power to appoint her children to certain trust property, they to have the remainder if she failed to make

the appointment, that the daughter having made her will wherein she made the appointment, the appointees took under her will and not under the father's.

⁶⁸In re Spencer's Estate, 119 App. Div. 883, 107 N. Y. Supp. 543; In re Ripley's Estate, 122 App. Div. 419, 106 N. Y. Supp. 844.

In Re Chapman's Estate, 61 Misc. Rep. 593, 115 N. Y. Supp. 981, it was held that the original will had created an estate in remainder which was vested, and although the power of appointment was exercised, the tax was not to be imposed.

If a power of appointment, although exercised, is not accepted by the appointee, as where children elected to take under their grandfather's will and not under a subsequent appointment, no tax was imposed.—In re Lewis' Estate, 60 Misc. Rep. 643, 113 N. Y. Supp. 1112.

utes in the various states have a general resemblance, but the different construction given to such statutes in the different jurisdictions makes it impossible to do more, in this work, than discuss the general principles involved. For the general purposes of execution and construction of a will of personal property, the rule of *mobilia sequuntur personam* applies. When, however, it is a matter of the state imposing and collecting an inheritance or succession charge, the rule, which is in fact a fiction of law, to a large extent disappears, in some cases being denied as having any application.⁶⁹ A state

⁶⁹ In *Eidman v. Martinez*, 184 U. S. 578, 46 L. Ed. 697, 22 Sup. Ct. 515, the court says: "In matters of taxation and of subjecting the personal property of non-residents to the claims of local creditors of the owner, serious encroachments have been made upon the ancient maxim (*mobilia sequuntur personam*), and a rule has grown up in modern times that legislation may deal with the personal as well as the real property of non-residents in their jurisdiction; and that such property, while enjoying the benefits and protection of the local law, may be taxed for the expenses of the local government."—Citing *Green v. Van Buskirk*, 5 Wall. 307, 18 L. Ed. 599, s. c., 7 Wall. 139, 19 L. Ed. 109; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003; *Walworth v. Harris*, 129 U. S. 355, 32 L. Ed. 712, 9 Sup. Ct. 340; *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. Ed. 835, 19 Sup. Ct. 545.

To the same effect, *Buck v. Beach*, 206 U. S. 392, 11 Ann. Cas. 732, 51 L. Ed. 1106, 27 Sup. Ct. 712.

In *Matter of Ramsdill*, 190 N. Y. 492, 18 L. R. A. (N. S.) 946, 83 N. E. 584, the court says: "When a specific foreign legatee of a foreign testator can obtain satisfaction of his legacy in a foreign jurisdiction, the executor can not be compelled to pay such legacy out of the assets within our jurisdiction. This is the necessary result of the practical and obvious distinction between testacy and intestacy as applied to this subject of taxation. If a specific legatee need not the intervention of our laws or courts to obtain what comes to him under a foreign will through foreign assets, in a foreign jurisdiction, our laws can not coerce an executor into paying his legacy out of funds within our jurisdiction for the sole purpose of exacting a tax. But in a case of intestacy the rule

may legally impose the tax on transfers of property, by will or under the laws of succession, if it acquires jurisdiction of the transfer or the subject matter. The statutes control and the enactments of each jurisdiction must be referred to in every case in order to explain the meaning of a decision thereunder. Practically the only universal principle which may be laid down is that no state can impose a tax on the transfer of property owned by a decedent who was domiciled and who died out of the state and whose estate is probated in a foreign jurisdiction, unless such property, tangible or intangible, is within the state, or resort must be had to the laws or the courts of the state to effectuate the transfer.

is essentially different, because the distributee takes an undivided interest in the whole estate; and if part of it happens to be within our jurisdiction, he can only get his share of what is here under our laws and through our courts."

Where a man and wife, residents of a foreign country, become domiciled in New York, the personal property which passes at the death of the husband is subject to the transfer tax of that state, the property being within the state.—*Matter of Majot*, 199 N. Y. 29, 29 L. R. A. (N. S.) 780, 92 N. E. 402.

In Illinois, as to personal property, it is held that the tax may be imposed in every case where the state has jurisdiction either of the person of the beneficiary or distributee, or property which passes, irrespective of the domi-

cile of the owner or of the situation of the property, if the property passes by reason of some right or privilege granted by the laws of the state.—*People v. Griffith*, 245 Ill. 532, 92 N. E. 313.

Under the laws of Montana, Rev. Codes, sec. 7675, all property may be taxed which passes by will or under the laws of succession of that state, irrespective of the domicile of the owner.—*State v. District Court*, 41 Mont. 357, 109 Pac. 438.

The status of the distributee and of the right of the state to the inheritance tax is fixed at the time of the death of the one whose property is to pass.—In *re Lander's Estate*, 6 Cal. App. 744, 93 Pac. 202; *People v. Barker*, 150 N. Y. 52, 44 N. E. 785; In *re Cook's Estate*, 187 N. Y. 253, 79 N. E. 991.

§ 291. The Same Subject: Taxes as to Personalty Sometimes Governed by Law of Domicile.

The Supreme Court of the United States and the courts of some local jurisdictions have, in construing particular statutes, in effect followed the rule that if a decedent dies in the state wherein he has had his domicile, and his estate is administered there, his personal property is considered as having followed him; and if such decedent left any personal property in another state, the tax on the same should be assessed under the law of his domicile.⁷⁰ But it is nowhere laid down that the rule

⁷⁰ Foreign Held Bonds Case, 15 Wall. (U. S.) 300, 21 L. Ed. 179; Eidman v. Martinez, 184 U. S. 578, 46 L. Ed. 697, 22 Sup. Ct. 515; Gallup's Appeal, 76 Conn. 617, 57 Atl. 699; Bridgeport Trust Co.'s Appeal, 77 Conn. 657, 60 Atl. 662; Hopkins' Appeal, 77 Conn. 644, 60 Atl. 657; State v. Dalrymple, 70 Md. 294, 3 L. R. A. 372, 17 Atl. 82; Neilson v. Russell, 76 N. J. L. 655, 131 Am. St. Rep. 673, 19 L. R. A. (N. S.) 887, 71 Atl. 286; Astor v. State, 75 N. J. Eq. 303, 72 Atl. 78; Matter of Dingman, 66 App. Div. (N. Y.) 228, 72 N. Y. Supp. 695; Matter of Swift, 137 N. Y. 77, 18 L. R. A. 709, 32 N. E. 1096; In re Bittinger's Estate, 129 Pa. St. 338, 18 Atl. 132; In re Lines' Estate, 155 Pa. St. 378, 26 Atl. 728; In re Miller's Estate, 182 Pa. St. 157, 37 Atl. 1000; In re Milliken's Estate, 206 Pa. St. 149, 55 Atl. 853.

But compare: Blackstone v. Miller, 188 U. S. 189, 47 L. Ed. 439, 23

Sup. Ct. 277; Dixon v. Russell, 78 N. J. L. 296, 73 Atl. 51; Matter of Bronson, 150 N. Y. 1, 55 Am. St. Rep. 632, 34 L. R. A. 238, 44 N. E. 707.

In Eidman v. Martinez, 184 U. S. 578, 46 L. Ed. 697, 22 Sup. Ct. 515; it was held that the war tax of 1898 imposing a tax on legacies or distributive shares arising from personal property passing "from any person possessed of such property, either by will, or by the intestate laws of any state or territory," did not apply to federal, municipal and corporation bonds in the custody of agents of the deceased in New York, the decedent being a Spaniard, domiciled abroad, and the property passing to his son, also an alien and domiciled abroad, partly by will and partly by the intestate laws of a foreign country. The English rule was approved.

Compare: In Blackstone v. Miller, 188 U. S. 189, 47 L. Ed. 439,

prevails against the statute, if the state has jurisdiction; but it is considered in determining the question of jurisdiction, as in the case of a debt due a non-resident, there being no tangible property within the state.

Under a former New Jersey statute taxing all property which "shall be within the state which shall be transferred by inheritance, distribution, bequest, devise, deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the intestate, testator, grantor or bargainor," it was held that stock in a New Jersey corporation which had belonged to a testator who had been domiciled in England where his will was probated, was not subject to the inheritance tax in New Jersey. The court said that the succession to the property was under the English law, and that the title to the legacy—stock in a New Jersey corporation—would not become complete and perfect until the executors had assented, and that they would not assent until the debts had been first paid. The executors of the domicile must determine whether the estate is solvent or not, and it is only after the accounts of the executors are settled that it can be ascertained whether the legacy will pass under

23 Sup. Ct. 277, construing the New York statute, it was held that money on deposit in New York banks could be taxed, the presence of the debtor in the state being in itself sufficient for the purpose of jurisdiction.

To the same effect, see Gallup's Appeal, 76 Conn. 621, 57 Atl. 699; Commonwealth v. Union etc. Transit Co., 118 Ky. 131, 142, 80 S. W. 490, 81 S. W. 268.

The cases of Neilson v. Russell,

76 N. J. L. 655, 131 Am. St. Rep. 673, 19 L. R. A. (N. S.) 887, 71 Atl. 286, and Astor v. State, 75 N. J. Eq. 303, 72 Atl. 78, were under the New Jersey law of 1894. But the law was amended in 1906, and the former decisions are no longer of any effect in that state, but are valuable for reference as to the construction of any similar law.

See Dixon v. Russell, 78 N. J. L. 296, 73 Atl. 51.

the will or not. Therefore, the succession is complete only in the foreign jurisdiction, and such succession was not properly taxable under the New Jersey laws.⁷¹

§ 292. The Same Subject: Situs as Applied to Personal Property.

Under a majority of the statutes in the United States imposing an inheritance or transfer tax, personal property will be taxed wherever it is found. Although it is the transfer which is taxed, yet the property is liable for its payment, and its presence in a state confers jurisdiction.⁷² Thus a Maryland statute which imposed an inheritance tax on all property "passing from any person

71 *Neilson v. Russell*, 76 N. J. L. 655, 131 Am. St. Rep. 673, 19 L. R. A. (N. S.) 887, 71 Atl. 286.

Under the law of New Jersey of 1894 (since amended), the tax on non-residents was imposed only in cases of inheritance, distribution, bequest and devise. These words were held naturally applicable to the general succession to the whole estate, but not to a particular succession to a special portion of the estate, which in the case at bar was stock in a New Jersey corporation. General succession under a foreign law is held not taxable in New Jersey.—*Astor v. State*, 75 N. J. Eq. 303, 72 Atl. 78.

Following *Wallace v. Attorney-General*, L. R. 1 Ch. App. 1; *Embury's Estate*, 45 N. Y. Supp. 881; *Eidman v. Martinez*, 184 U. S. 578, 46 L. Ed. 697, 22 Sup. Ct. 515.

The statute of New Jersey was

amended in 1906, and by the second subdivision to the first section thereof it provides that a tax may be imposed "when the transfer is by will or intestate law of property within the state, and the decedent was a non-resident of the state at the time of his death."

Under this last act, shares of stock in a New Jersey corporation, owned by a non-resident decedent who died without the state, and which stock was not in New Jersey at the owner's death, was held subject to the tax.—*Dixon v. Russell*, 78 N. J. L. 296, 73 Atl. 51.

72 *In re Weaver*, 110 Iowa 328, 81 N. W. 603; *State v. Dalrymple*, 70 Md. 294, 3 L. R. A. 372, 17 Atl. 82; *State v. Brim*, 4 Jones Eq. (57 N. C.) 300; *In re Speers*, 6 Ohio Dec. 398; *Estate of Hood*, 21 Pa. St. 106; *Orcutt's Appeal*, 97 Pa. St. 179.

who may die seised or possessed thereof, being in the state" was held to refer to *property* in the state and not to the person; therefore personalty of a non-resident dying out of the state, which passed to non-residents, such personalty being within the state of Maryland, was subject to the tax.⁷³

⁷³ State v. Dalrymple, 70 Md. 294, 3 L. R. A. 372, 17 Atl. 82.

To the same effect, see Commonwealth v. Smith, 5 Pa. St. 142; In re Short's Estate, 16 Pa. St. 63; Gardiner v. Carter, 74 N. H. 507, 69 Atl. 939; Kingsbury v. Bazeley, 75 N. H. 13, 139 Am. St. Rep. 664, 20 Ann. Cas. 1355, 70 Atl. 916.

See post, § 294, notes 79, 80, 81.

A North Carolina statute imposing an inheritance tax upon "all personal property or goods bequeathed to strangers or collateral kindred, or which shall be distributed to, or amongst the next of kin, of any intestate, where such next of kin are collateral relations of such intestate," was held to apply to property in North Carolina descending to a brother from an intestate domiciled in Canada, the court holding the rule was applicable to both real and to personal property.—Alvany v. Powell, 2 Jones Eq. (N. C.) 51.

In Carlton v. Carlton, 72 Me. 115, 39 Am. Rep. 307, the court says: "The word 'property' includes choses in action as well as choses in possession. It includes

money due as well as money possessed."

Where a debt was due from a resident of New York to a decedent who had been domiciled without the state, and the note evidencing the same was within the state when the creditor died, it was held that the transfer tax attached.—In re Tiffany's Estate, 143 App. Div. 327, 128 N. Y. Supp. 106.

Deposits within the state at the time of the death of a non-resident owner were held taxable, although the argument was made that they had been transmitted there only for the purpose of investment.—In re Myers' Estate, 129 N. Y. Supp. 194.

Mortgages, notes, land contracts and papers representing property in Michigan were in the possession of the owner who died domiciled in New York. All devisees and legatees were non-residents of Michigan, yet the tax was imposed on the ground that it was necessary to come under the Michigan law in order that ancillary administration might be had and the estate closed.—In re Roger's Estate, 149 Mich. 305, 119 Am. St.

In New York the statutes relative to inheritance and succession taxes have been several times amended. Under a former act, where tax was imposed upon "all property which shall pass by will or by the intestate laws of the state, from any person who may die seised or possessed of the same while being a resident of the state, or which property shall be within this state, or any part of such property, . . . transferred by deed, grant, sale or gift made or intended to take effect . . . after the death of the grantor," it was held that the statute did not apply to property within the state which passed by will or under the laws of succession from a non-resident decedent to either relatives or strangers domiciled within the state; and that the clause, "or which property shall be within the state," was limited to such property as was transferred by deed, grant or gift *inter vivos*.⁷⁴ When the above statute was amended and a clause was added thereto imposing the tax where the property belonged to a non-resident decedent, the clause reading: "Or if such decedent were not a resident of the state at the time of death, which property, or any

Rep. 677, 11 L. R. A. (N. S.) 1134, 112 N. W. 931.

Moneys covered by a check sent to New York, drawn against a bank deposit in Montana, and received in New York and deposited for collection by the payee, but which had not been collected at the death of the payee, were held subject to the transfer tax imposed by the New York law, the reason being that the moneys were subject to the payee's order. —Matter of Daly, 100 App. Div.

373, 91 N. Y. Supp. 858, affirmed 182 N. Y. 524, 74 N. E. 1116.

Compare: Buck v. Beach, 206 U. S. 392, 11 Ann. Cas. 732, 51 L. Ed. 1106, 27 Sup. Ct. 712, in which case it was held that mortgage notes made and payable in one state were not subject to the inheritance tax in another state merely because, at the death of the owner, they were within such state merely for the purpose of safe-keeping.

⁷⁴ Matter of Enston, 113 N. Y. 174, 3 L. R. A. 464, 21 N. E. 87.

part thereof, shall be within this state," it was held that personal property of a non-resident at the time of his death, which had been kept continuously within the state and invested there, was subject to the tax.⁷⁵

§ 293. The Same Subject: "Tangible or Intangible" Personal Property.

The succession to property of non-residents was held to be subject to taxation in Massachusetts the same as if the property belonged to those domiciled in the state, under a statute imposing a tax upon "all property within the jurisdiction of the commonwealth, and any interest therein, whether belonging to inhabitants of the commonwealth or not, and whether tangible or intangible, which shall pass by will or by the laws of the commonwealth regulating intestate succession." Therefore the property of a decedent non-resident, consisting of moneys on deposit and stocks and bonds of railroads and of other states and the like, and which were within the jurisdiction of the state of Massachusetts, was held subject to taxation.⁷⁶

And stock in corporations organized under the laws of Massachusetts and of national banking corporations located within the state belonging to a non-resident and not within the state at his death, have been held to be within the jurisdiction of Massachusetts, within the meaning of the statute.⁷⁷

⁷⁵ *Matter of Estate of Romaine*, 127 N. Y. 80, 12 L. R. A. 401, 27 N. E. 759.

⁷⁶ *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176.

⁷⁷ *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372.

See, also, *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176; *In re Bronson*, 150 N. Y. 1, 55 Am. St. Rep. 632, 34 L. R. A. 238, 44 N. E. 707; *Tappan v. Merchants National Bank*, 19 Wall. 490, 22 L. Ed. 189; *First National*

§ 294. The Same Subject: Bonds and Certificates of Stock of Corporations Distinguished.

Certificates of *stock* in a corporation have been distinguished from *bonds* issued by the same company. Stock has been held to represent a definite interest in the corporate property, a definite right to certain dividends, if any, and a definite right to certain proceeds upon dissolution. Therefore, as to *stock*, if issued by a domestic corporation, it has been held subject to an inheritance or succession tax, irrespective of the domicile of the decedent owner or the actual physical location of such stock at the time of the owner's death. The fact of the corporation having been organized under the law of the state has been held sufficient for the purposes of jurisdiction.⁷⁸ On the other hand, *bonds* issued by a domestic corporation have been classified simply as debts. Being intangible, they follow the person of the owner and therefore are taxable only under the law of the domicile of the decedent owner. The general rule may be said to be that the *situs* of a debt due from the resi-

Bank of Mendota v. Smith, 65 Ill. 44, 55; Street Railroad Co. v. Morrow, 87 Tenn. 406, 427, 2 L. R. A. 853, 11 S. W. 348.

⁷⁸ Matter of Bronson, 150 N. Y. 1, 55 Am. St. Rep. 632, 34 L. R. A. 238, 44 N. E. 707.

As to bonds, see, also, Callahan v. Woodbridge, 171 Mass. 595, 51 N. E. 176.

Stock of a railroad company incorporated under the laws of more than one state, and owning property and operating in the states where organized, Massa-

chusetts being one, was held subject to the collateral inheritance tax in the latter state.—Kingsbury v. Chapin, 196 Mass. 533, 13 Ann. Cas. 738, 82 N. E. 700.

Stock owned by a non-resident decedent in a domestic corporation was held to constitute an interest in the corporate property and was subject to the tax which included "all property within the jurisdiction of the state."—In re Culver's Estate, 145 Iowa 1, 25 L. R. A. (N. S.) 384, 123 N. W. 743.

dent of one state to a decedent who had been domiciled and who died in another state, is that of the domicile of the decedent. Such a debt is not within the state of the debtor,⁷⁹ and the rule has been applied even though the debt may have been secured by a mortgage on real property within the state.⁸⁰ But a distinction has been

⁷⁹ *Matter of Corning*, 3 Misc. Rep. (N. Y.) 160, 23 N. Y. Supp. 285; *Matter of Phipps*, 77 Hun (N. Y.) 325, 28 N. Y. Supp. 330, affirmed 143 N. Y. 641, 37 N. E. 823; *In re Stanton's Estate*, 15 Pa. Co. Ct. 17.

Contra: *In re Joyslin*, 76 Vt. 88, 56 Atl. 281, wherein it was held that debts, although evidenced by notes, had no situs other than that of the debtor.

See, ante, § 292, note 73.

"Debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations belong to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due."—*Foreign Held Bonds Case*, 15 Wall. (U. S.) 300, 21 L. Ed. 179.

This case is distinguished and limited in *Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 439, 23 Sup. Ct. 277.

In *Orcutt's Appeal*, 97 Pa. St. 179, a distinction is made between tangible and intangible property, holding that bonds of the United States have no situs different from the owner, irrespective of where they may be deposited, and such bonds belonging to a citizen of New Jersey who was domiciled there at his death, were not subject to an inheritance tax in Pennsylvania although the bonds were on deposit in that state.

⁸⁰ *Matter of Preston*, 75 App. Div. (N. Y.) 250, 78 N. Y. Supp. 91; *In re Stanton's Estate*, 15 Pa. Co. Ct. 17.

Bonds, although secured by a mortgage on property within the state, if belonging to a non-resident decedent and actually without the state at the time of his death, are not considered as being within the state for the purposes of the tax.—*In re Fearing's Will*, 200 N. Y. 340, 93 N. E. 956.

Compare: *In re Gibbs' Estate*, 60 Misc. Rep. 645, 113 N. Y. Supp. 939.

made where such bonds, although the property of the estate of a decedent who had been domiciled without the state, were physically within the state at the time of the owner's death. In such a case the actual presence of the bonds within the state, even of a foreign corporation, has been held sufficient for the purposes of imposing the tax.⁸¹

§ 295. The Same Subject: What Is "Property Within the State?"

As to what constitutes "property within the state," is the subject of conflicting decisions. Under a New York statute which defined the word "property" to include all property or interests therein over which the state had jurisdiction, *bonds* owned by a non-resident who had possession of them at his death, were held not to be subject to the tax, since they simply represented a debt or chose in action which followed the person of the creditor and was inseparable from him. As to *shares of stock* of a

As to debts of a decedent, where the personal estate is liable, the law of the domicile of the decedent controls.—*Rice v. Harbeson*, 63 N. Y. 493.

Compare: *Bowaman, v. Reeve*, Prec. in Ch. 577.

Contra: The Massachusetts rule is different; there a debt secured by a mortgage on real property within the state is held subject to the inheritance or succession tax.—*Kinney v. Treasurer and Receiver General*, 207 Mass. 368, Ann. Cas. 1912A 902, 35 L. R. A. (N. S.) 784, 93 N. E. 586.

Where the real estate of a de-

cedent is liable for his debts, the law of the situs of the property governs.—*Hanson v. Walker*, 7 L. J. Ch. 135; *Dickinson v. Hoomes*, 8 Gratt. (Va.) 353, 410.

⁸¹ See, post, § 295, and notes.

In *Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 439, 23 Sup. Ct. 277, the court says: "Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions."

New York corporation owned by a non-resident decedent, although such stock was not physically within the state, yet a different rule was laid down. It was held that each share represented a distinct interest in the corporate property and that although personalty follows the owner, yet each certificate of stock represented a right to share in the proceeds or property of the corporation, which did not preclude the taxing of the distinct interest in the actual property represented by the certificate.⁸²

In the foregoing case it will be noted that the bonds in question were not physically within the state. If, however, the fiction that personal property follows the owner does not govern, and it does not control in matters of inheritance or succession taxes as against the wording of the statute, since a state may lawfully impose any tax upon any subject matter over which it can acquire jurisdiction, the presence of the debtor within the state, as would be the case with bonds issued by a domestic corporation, may be held sufficient to allow a state to impose a tax upon the right to acquire the property right

⁸² *Matter of Bronson*, 150 N. Y. 1, 55 Am. St. Rep. 632, 34 L. R. A. 238, 44 N. E. 707.

In a strong dissenting opinion in the *Matter of Bronson*, *supra*, Justice Vann, concurred in by one other, stated that bonds were property within the meaning of the act and were subject to the tax, saying: "There is nothing, therefore, in the nature of the most intangible right, such as a debt without any written evidence thereof, to prevent the legislature from giving it a situs apart from the residence of the owner, but

in order to permit this it must have some practical existence in the state that assumes jurisdiction over it either for the purpose of taxation or the collection of debts. In the latter case the residence of the debtor is deemed to give the debt a practical existence in the state where the debtor resides, because the non-resident creditor, if his claim is not paid voluntarily, must go where his debtor is and invoke the aid of the laws in force there, in order to collect it."

of such debt from a decedent, either by will or under the laws of succession.⁸³ In another New York case, where a resident of Rhode Island leaving a will disposing of moneys on deposit in banks in New York, and bonds and certificates of stock of both New York and other corporations and bonds of the United States which were in a safe deposit box in New York City at the time of his death, it was held that the certificates of stock and bonds of both domestic and foreign corporations, being physically within the state, were subject to the transfer tax. The United States bonds, however, were held exempt merely for the reason that they were not covered by the statute.⁸⁴

⁸³ In the *Matter of Houdayer*, 150 N. Y. 37, 55 Am. St. Rep. 642, 34 L. R. A. 235, 44 N. E. 718, in attempting to fix a test as property within the state, the court says: "While distribution of the fund belongs to the state where the decedent was domiciled, as such distribution can not be made until his administrator has come into this state to get the fund, possibly, after resorting to the courts for aid in reducing it to possession, the fund has a situs here, because it is subject to our laws. A reasonable test in all cases, as it seems to me, is this: Where the right, whatever it may be, has a money value and can be owned and transferred, but can not be enforced or converted into money against the will of the person owning the right without coming into this state, it is property

within this state for the purposes of a succession tax."

⁸⁴ *Matter of Whiting*, 150 N. Y. 27, 55 Am. St. Rep. 640, 34 L. R. A. 232, 44 N. E. 715.

See, also, *Matter of Houdayer*, 150 N. Y. 37, 55 Am. St. Rep. 642, 34 L. R. A. 235, 44 N. E. 718.

Personal property, consisting of stocks and bonds of foreign and domestic corporations, mortgages upon lands in New York, and moneys on deposit in the banks of that state, which belonged to a decedent who was a resident of New Jersey, was held liable for the tax.—*Matter of Morgan*, 150 N. Y. 35, 44 N. E. 1126.

A deposit, however, is considered as tangible property and therefore is viewed differently from an ordinary debt and is taxed according to its situs no matter what the domicile of the

§ 296. The Same Subject: English Rule.

In England, different statutes apply to the taxing of bequests or legacies of personal property under the will of a decedent testator, from the taxing of the right to succeed to the property of an intestate decedent.⁸⁵ The

depositor may have been.—*Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 439, 23 Sup. Ct. 277; *Matter of Clark*, 2 Connoly (N. Y.) 183; *Matter of Blackstone*, 69 App. Div. 127, 74 N. Y. Supp. 508; see 171 N. Y. 682, 64 N. E. 1118; *Matter of Houdayer*, 150 N. Y. 37, 55 Am. St. Rep. 642, 34 L. R. A. 235, 44 N. E. 718.

As to corporate stocks, in the case of a non-resident decedent the property is considered as in the state where the corporation is organized and doing business and would be subject to the tax according to the laws of the state where the corporation is located.—*Matter of Bronson*, 150 N. Y. 1, 55 Am. St. Rep. 632, 34 L. R. A. 238, 44 N. E. 707; *Matter of Newcomb*, 71 App. Div. 606, 76 N. Y. Supp. 222, affirmed 172 N. Y. 608, 64 N. E. 1123.

But where a resident decedent has died having the actual possession of certificates of stock of a foreign corporation it has been held that the disposition of such stock may be taxed under the laws of his domicile.—*Matter of Whiting*, 150 N. Y. 27, 55 Am. St. Rep. 640, 34 L. R. A. 232, 44 N. E. 715.

As to corporate bonds, however,

their situs has been determined to be the place where they actually are at the time of the owner's death.—*Matter of Whiting*, 150 N. Y. 27, 55 Am. St. Rep. 640, 34 L. R. A. 232, 44 N. E. 715; *Matter of Morgan*, 150 N. Y. 35, 44 N. E. 1126; *Matter of Bronson*, 150 N. Y. 1, 55 Am. St. Rep. 632, 34 L. R. A. 238, 44 N. E. 707.

Contra: *Orcutt's Appeal*, 97 Pa. St. 179.

⁸⁵ *English Statutes*.—In England the "Legacy Duty Act," imposing a legacy tax, reads in part as follows: That "for every legacy, specific or pecuniary, given by any will of any person out of his personal or movable estate, or out of or charged upon his real or heritable estate," the duties imposed by the act shall be payable. A different act, known as the "Succession Duty Act," imposes a tax on the right of succession, the term "property" as used in the act including property of every description. The act in part is as follows: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time

rule, as to taxing a bequest or legacy of personal property, is that such tax should be imposed according to the law of the domicile of the decedent, no matter where such property may be actually situated.

Thus where a British subject domiciled and dying in a British colony where the law of Holland was in force, was entitled at the time of his death to a large debt in Scotland which arose from money acquired and transmitted to Scotland by him while living abroad, it was held that a legacy of such debt was not liable to the tax in England. The fact that the personal property is administered in England does not impose a legacy tax. Such liability does not depend upon any act of the executor proving the will in England, or of its administration there.⁸⁶ Conversely, where a British subject died domiciled in England, a legacy tax was properly imposed,

appointed for the commencement of this act, . . . shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition, a 'succession.'"

⁸⁶ *Thomson v. Advocate-General*, 12 Cl. & Fin. 1, overruling *Attorney-General v. Cockerell*, 1 Price 165, and *Attorney-General v. Beatson*, 7 Price 560.

See, also, *Attorney-General v. Forbes*, 2 Cl. & Fin. 48; *Wallace v. Attorney-General*, L. R. 1 Ch. App. 1.

The case of *Thomson v. Advocate-General*, supra, was approved in *Eidman v. Martinez*, 184 U. S. 578, 46 L. Ed. 697, 22 Sup. Ct. 515.

The case of *Wallace v. Attorney-General*, supra, was approved

in *Astor v. State*, 75 N. J. Eq. 303, 72 Atl. 78.

In *Thomson v. Advocate-General*, 12 Cl. & Fin. 1, Lord Chief Justice Tindal says: "It is admitted in all the decided cases, that the very general words of the statute, 'every legacy given by any will or testamentary instrument of any person,' must of necessity receive some limitation in their application, for they can not in reason extend to every person, everywhere, whether subjects of this kingdom or foreigners, and whether at the time of their death domiciled within the realm or abroad. And as your lordship's question applies only to legacies out of personal estate, strictly and properly so called, we think such

on his personal property situated in foreign countries.⁸⁷ And where a British subject died in India, who had never been domiciled there, his personal property, although most of it was situated abroad, was held liable to the legacy duty.⁸⁸

But as to taxing the right to succeed to the property of an intestate decedent, it is held that where either a British subject or an alien succeeds to personal property under a British settlement and which property is vested in British trustees, he is liable to the succession tax, irrespective of the nationality or domicile of the settlor, or whether the settlement had been made by will or deed.⁸⁹

necessary limitation is, that the statute does not extend to a will of any person who at the time of his death was domiciled out of Great Britain, whether the assets are locally situate within England or not. For we can not consider that any distinction can be properly made between debts due to the testator from persons resident in the country in which the testator is domiciled at the time of his death, and debts due to him from debtors resident in another and different country; but all such debts do equally form part of the personal property of the testator or intestate, and must all follow the same rule, the law of the domicile of the testator."

To the same effect, see *Arnold v. Arnold*, 2 Myl. & Cr. 256; *Wallace v. Attorney-General*, L. R. 1 Ch. App. 1; *Lyall v. Lyall*, L. R. 15 Eq. 1.

⁸⁷ *In re Ewin*, 1 Cr. & Jerv. 151.

⁸⁸ *Attorney-General v. Napier*, 6 Exch. 217, 20 L. J. Ex. 173.

⁸⁹ *Attorney-General v. Campbell*, L. R. 5 H. L. 524, 41 L. J. Ch. 611; *Lyall v. Lyall*, L. R. 15 Eq. 1.

In earlier cases, with reference to the statutes above mentioned, "Legacy Duty Act" and "Succession Duty Act," a distinction was drawn between them.

In *Thomson v. Advocate-General*, 12 Cl. & Fin. 1, it was said that such distinction was "extremely thin."

In *Lyall v. Lyall*, L. R. 15 Eq. 1, the former cases were reviewed and it was said that the argument against a "legacy duty," as stated in *Thomson v. Advocate-General*, *supra*, would apply with equal force to the taxes under the "Succession Duty Act."

But in *Attorney-General v. Campbell*, L. R. 5 H. L. 524, 41 L. J. Ch. 611, it had been decided

that when a person, whether an alien or a British subject, succeeds to property under a British settlement vested in British trustees, he is liable to pay a succession duty, whether the settlement be made by an alien or a British subject, and whether the settlement be made by deed or will, and wherever the property is locally situated.

The case of *Lyall v. Lyall*, *supra*, with apparent reluctance, followed the decision in *Attorney-General v. Campbell*, *supra*, as to "succession taxes," but *Thomson v. Advo-*

cate-General, *supra*, as to "legacy taxes," was not affected.

Thus, under *Thomson v. Advocate-General*, *supra*, if an alien, on his marriage, should invest in consuls in trust for himself for life, and afterward as he should appoint by will, and, in default of an appointment, to his son absolutely, if he should die after having bequeathed the property to A. B., A. B. would not have to pay a "legacy duty"; but under *Attorney-General v. Campbell*, *supra*, if the alien should die "intestate," then the son would have to pay a "succession tax."

CHAPTER XIII.

LEGAL DISABILITIES IMPOSED UPON CERTAIN PERSONS.

- § 297. Distinction between disabilities imposed and mental incapacity.
- § 298. Infancy: Testators under a fixed age can not make valid wills: English rule.
- § 299. The same subject: Rule in the United States.
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- § 301. Married women: Disabilities at common law.
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- § 304. The same subject: Disability removed by husband's death, and other causes.
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- § 311. The general principles prevailing in the United States as to the rights of married women.
- § 312. Civil death generally.
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- § 315. Attainder and corruption of blood.
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- § 317. Bills of attainder and corruption of blood in the United States: Constitutional provision.
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- § 322. The same subject: As to personal property.
- § 323. The same subject: Disabilities of alien enemies.
- § 324. The same subject: Effect of treaties.
- § 325. The same subject: State regulations.

§ 297. Distinction Between Disabilities Imposed and Mental Incapacity.

The right to make a testamentary disposition of property is limited. No person of unsound mind, one lacking testamentary capacity, can make a valid will. The issue in such a case is the mental intelligence of the testator. Testamentary power, however, is denied to others, either wholly or partially, not because of unsoundness of mind, but for reasons of policy once existing, which to a limited extent still exist, and which have colored the law on the subject. Thus an infant under a certain age can not make a testamentary disposition of property, not because of unsoundness of mind such as insanity, but rather because the law assumes that his mind has not sufficiently matured. Restraints have been imposed upon the testamentary power of married women not because of lack of mental intelligence, but because of the common law rights of the husband in her property and because of his assumed control and dominion over her actions. The

rights of aliens, outlaws and convicted felons to acquire, hold and dispose of property have been limited for reasons of state. Testamentary disability, therefore, does not in all cases comprehend a lack of mental capacity.

§ 298. Infancy: Testators Under a Fixed Age Can Not Make Valid Wills: English Rule.

The rule of the civil law was that a male of the age of fourteen years and a female of the age of twelve, might make a valid testament of personal property.¹ But the testator, no matter of what age, was required to have sufficient mental capacity; therefore madmen, idiots, those whose minds had failed by reason of old age or drunkenness, thus lacking mental ability, could not make valid wills.² The rule of the common law fixed the same age limit.³

As to real property, the Statute of Wills of Henry VIII prescribed that no person, male or female, could devise the same unless of the age of twenty-one years. This, however, was only confirmatory of the rule already existing at common law.⁴ By statute, however, the father of

¹ Godolph, pt. 1, ch. 8; Gilb. Eq. Rep. 74; 2 Bl. Com. *497; Hyde v. Hyde, Prec. ch. 316; Deane v. Littlefield, 1 Pick. (Mass.) 239; Campbell v. Browder, 7 Lea (Tenn.) 240, 241.

² Swinburne Wills, pt. 2, §§ 3, 4, 5, 6.

After a boy had reached the age of fourteen and a girl the age of twelve, each could approve a testament of personal property made before arriving at the ages mentioned and thus validate a former

testament.—Swinburne Wills, pt. 11, § 2.

³ Bacon's Abr. (Bouvier Ed.) Tit. Wills, B; Ex parte Holyland, 11 Ves. Jun. 11; In re Smith's Estate, Clements v. Ward, 35 Ch. Div. 589; Hargrave's Notes to Coke Litt. 89b, referring to the conflict of opinion on the subject, and concluding that the above is the established rule.

⁴ Under the Statute of Wills, 32 Henry VIII, ch. 1, explained by 34 Henry VIII, ch. 5, no one could

infant children, although under the age of twenty-one years, if unmarried at the time of his death, by deed during his life or by his will and testament in writing, could appoint a testamentary guardian for such minors.⁵ But by Statute of Wills of 1 Victoria it is provided that no will made by any person under the age of twenty-one

devise real property unless of the age of twenty-one years; however, in certain localities, by reason of special customs, devises of lands were sanctioned at an earlier age.—Bacon's Abr. (Bouvier Ed.) Vol. 10, Tit. Wills, B; West v. West, 10 S. & R. (Pa.) 446; Campbell v. Browder, 7 Lea (Tenn.) 240, 241.

Compare: Moore v. Moore, 23 Tex. 637; Goodell v. Pike, 40 Vt. 319.

A devise made under the age of twenty-one years, although the testator died after reaching that age, was held void.—Herbert v. Torball, 1 Sid. 162 (15th year of Charles II).

⁵ Statute of 12 Charles II, ch. 24, section 8, provided, "That where any person hath or shall have any child or children under the age of one and twenty years, and not married at the time of his death, that it shall and may be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or at that time in ventre sa mere, or whether such father be within the age of one and twenty years, or of full age,

by his deed executed in his lifetime, or by his will and testament in writing, in the presence of two or more credible witnesses, in such manner, and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children, for and during such time as he or they shall respectively remain under the age of one and twenty years, or any lesser time, to any person or persons in possession or remainder, other than popish recusants." See, also, Statute of 14 and 15 Charles II, (I.). The age of twenty-one was prescribed by the Statute of 1 Victoria, ch. 26, for the appointment of guardians by deed or will. The above act regarding the appointment of guardians, being a statutory regulation and not a part of the common law, would not prevail in America unless sanctioned by statute (*Wardwell v. Wardwell*, 9 Allen (Mass.) 518), but it has been, in some instances, assumed to be effective.—*Noyes v. Barber*, 4 N. H. 406; *Balch v. Smith*, 12 N. H. 437. It has, however, been substantially re-enacted in some states in the United States.

years shall be valid,⁶ the term "will" extending to all testaments, codicils, appointments by will or by a writing in the nature of a will in the exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, and to any other testamentary disposition. No distinction is made between wills of real and of personal property.⁷

§ 299. The Same Subject: Rule in the United States.

The general rule in the United States is the same as that in England, a will executed by a person under the age of twenty-one years being declared invalid. The rule, however, is not uniform. For instance, in California, a valid will of both real and personal property may be made by one over eighteen years of age, no distinction being made between males and females.⁸ In New York, a male of eighteen and a female of sixteen may bequeath personal property; in Alabama any person of eighteen may make a testament of personalty, but he must be twenty-one in order to devise realty.⁹ The old reasons for drawing a distinction between males and females, and between real and personal property, have largely disappeared; the statutory regulations are liable to change at any time, and the particular laws in question in any case should be directly referred to.

⁶ Statute 1 Victoria, ch. 26, § 7.

⁷ Statute 1 Victoria, ch. 26 (Introd.) The Statutes of 12 Charles II, ch. 24, and 14 and 15 Charles II (I.), are specially referred to, and the age limit for the appoint-

ment of a guardian by deed or will is therefore fixed at twenty-one years.

⁸ Cal. Civ. Code, § 1270.

⁹ N. Y. Consol. Laws (1909) D. Ch. 244; Ala. Civ. Code, ch. 150.

§ 300. Manner of Computing the Time When Minority Ends.

The rule of the common law was that an infant reached his majority at the commencement of the day preceding the anniversary of his birthday; the law rejected all fractions of a day, and since a minor attained his majority at the last moment of the day when his minority ceased, he was deemed to be of full age on the first moment of such day.¹⁰ In some of these United States, however, the period of minority is fixed by statute as, for instance, in California, infancy covers that period from the first minute of the day on which a person is born to the first minute on the corresponding day completing the period of minority.¹¹

§ 301. Married Women: Disabilities at Common Law.

Under the civil law, a married woman had the same right of bequeathing property as did a *feme sole*. But at common law, the personal property of the wife, including her chattels real, belonged absolutely to the husband, and her real property was subject to his disposition and passed to him wholly upon her death. Testamentary

¹⁰ "It has been adjudged that if one be born on the first day of February at eleven at night, and the last day of February in the twenty-first year of his age, at one o'clock in the morning, he makes his will, of lands, and dies, it is a good will, for he is then of age."—Anon., 1 Salk. 44.

To the same effect, see: Sir Robert Howard's Case, 2 Salk. 625; Grant v. Grant, 4 Yo. & Col. 256.

"Our law rejects fractions of a

day more generally than the civil law does. The effect is to render the day a sort of indivisible point; so that any act, done in the compass of it, is no more referable to any one, than to any other portion of it; but the act and the day are co-extensive."—Lester v. Garland, 15 Ves. Jun. 248, 257.

¹¹ Cal. Civ. Code, § 26. See, also, Sayles v. Christie, 187 Ill. 420; 58 N. E. 480.

power in a married woman would have been inconsistent with such a rule. She could make a bequest of goods and chattels only with the consent of her husband. Such consent could be given after the death of the wife as well as before; but although a husband had himself given his consent, yet he had the right to revoke the same even after the death of his wife, or at least at any time before the will was proved.¹² If, however, the bequeathing by

¹² Swinb. Wills, pt. 2, § 9; Bacon's Abr. (Bouvier Ed.) Tit. Wills, B; 2 Bl. Com. *498; Brook v. Turner, 2 Mod. 170; Rex v. Bettsworth, 2 Strange 891; Cutter v. Butler, 25 N. H. 343, 357, 57 Am. Dec. 330; Henley v. Philips, 2 Atk. 49; Maas v. Sheffield, 10 Jur. 417; Barnes v. Irwin, 2 Dall. (U. S.) 199, 201, 1 L. Ed. 348; George v. Bussing, 15 B. Mon. (Ky.) 558; Osgood v. Breed, 12 Mass. 525; Newlin v. Freeman, 23 N. C. 514; Emery v. Neighbour, 7 N. J. Law 142, 11 Am. Dec. 541; Estate of Wagner, 2 Ashm. (Pa.) 448; Fisher v. Kimball, 17 Vt. 323. Consent given for a valuable consideration is irrevocable.—Osmund's Estate, 161 Pa. St. 543, 29 Atl. 266.

Section 25 of the statute of 29 Charles II, ch. 3, declared that the act shall not "be construed to extend to estates of feme covert that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy

the same as they might have done before the making of said act."

The queen consort was not restricted, as were other married women, but could bequeath her personal property without the consent of her husband.—Coke Litt. 133.

The reason of the rule that a married woman could not make a testamentary disposition of her property was not because she was deemed lacking in testamentary capacity, but because of her being under the dominion of her husband and of his right to and control of her property.—Barnes v. Irwin, 2 Dall. (U. S.) 199, 202, 1 L. Ed. 348.

There is a conflict of opinion as to whether a married woman could bequeath choses in action due her, the property of which had never come into her possession during coverture, and of her wearing apparel and the like. Some have claimed she could make such bequests without her husband's consent, others have held to the contrary; yet it is

the wife of her personalty was with the bare assent of the husband, it was necessary that he survive her, for such consent was merely a waiver of his right to administer to his wife; and if he died before his wife, the will was void as against her next of kin.¹³

agreed that the husband could not give the goods away from her and that at his death they did not pass to his executor.—Bacon's Abr. (Bouvier Ed.) Tit. Wills, B.

A married woman can not appoint an executor without the consent of her husband, the administration of her goods belonging to him. Upon the death of the wife, the husband has the right to bring an action to recover moneys which were due his wife at the time of her death, he succeeding directly to moneys which would subsequently become due.—Andrew Ognel's Case, Coke Rep. pt. 4, 48b. 52b.

"By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover, she performs everything."—1 Bl. Com. *442.

Such a will only operates to pass things that do not belong to the husband, but which he would have a right to after her death only as her administrator. The personal property which had belonged to her, and which was re-

duced to possession by the husband and thereby became his absolutely, does not pass by her will.—George v. Bussing, 15 B. Mon. (Ky.) 558.

A married woman could make a will of her personal property with the consent of her husband, which could be evidenced by consent after marriage or by an antenuptial agreement.—Bacon's Abr. (Bouvier Ed.) Tit. Wills, B.

The right to make a disposition of property by will may be given a woman subsequently married, by an antenuptial agreement with her intended husband.—Newburyport Bank v. Stone, 13 Pick. (Mass.) (1832) 420.

A husband's assent might have been either express or implied.—Cutter v. Butler, 25 N. H. 343, 357, 358, 57 Am. Dec. 330.

The husband's assent to the will of his wife might be implied from the fact that the will was in his handwriting.—Grimke v. Grimke's Exrs., 1 Desaus. (S. C.) 366; Smelie's Exr. v. Reynolds, 2 Desaus. (S. C.) 66.

¹³ Bacon's Abr. (Bouvier Ed.) Tit. Wills, B, citing: Stevens v. Bagwell, 15 Ves. Jun. 156; Scammell v. Wilkinson, 2 East 552; Smelie's Exr. v. Reynolds, 2 De-

§ 302. The Same Subject: Exceptions to the Rule.

The rule as to disabilities of married women did not extend to those cases where she acted in a representative capacity, such as an executrix under a will.¹⁴ And where property had been transferred to a married woman with a power of appointment by will, she could make a devise of the same by exercising the power of appointment, the will not taking effect as such, but the property passing by reason of the exercise of the power of appointment.¹⁵ This rule applied to both real and personal property.¹⁶

§ 303. The Same Subject: Right of Testamentary Disposition of Her "Separate Personal Estate."

Where personal property was settled on or held in trust for a married woman for her separate use, equity considered that she took it with all the incidents belonging to ownership, the power of bequeathing the same being one

saus. (S. C.) 66; Cassel's Admr. v. Vernon, 5 Mason (U. S. C. C.) 332, Fed. Cas. No. 2503; Bradish v. Gibbs, 3 Johns. Ch. (N. Y.) 523; Anderson v. Miller, 6 J. J. Marsh (Ky.) 568, 573.

¹⁴ Scammell v. Wilkinson, 2 East 552; Hodsdon v. Lloyd, 2 Bro. C. C. 534; In re Martin, 3 Sw. & Tr. 1; In re Richards, L. R. 1 P. & D. 156.

¹⁵ Rich v. Beaumont, cited in Marlborough v. Godolphin, 2 Ves. Sen. 64; Southby v. Stonehouse, 2 Ves. Sen. 610, 612; Barnes v. Irwin, 2 Dall. (U. S.) 199, 201, 1 L. Ed. 348; Anderson v. Miller, 6 J. J. Marsh (Ky.) 568, 573; Bradish v. Gibbs, 3 Johns. Ch. (N. Y.)

523; Osmond's Estate, 161 Pa. St. 543, 29 Atl. 266.

"A married woman, with the assent of her husband, may make a will, by way of appointment, of the personal property at her disposal; and such appointment being in its nature and character a testamentary document, it shall be so far respected and treated as such, as to be admitted to proof in the ordinary courts of probate."—Newburyport Bank v. Stone, 13 Pick. (Mass.) 420.

¹⁶ Holman v. Perry, 4 Metc. (Mass.) 492, 496; Osgood v. Breed, 12 Mass. 525; Marston v. Norton, 5 N. H. 205.

of such incidents. As to such personal property, she had all the rights of testamentary disposition the same as if she had been a *feme sole*.¹⁷ The same rule applied to the proceeds from real property settled to her separate use. A married woman could dispose of such separate personal estate by will without the consent of her husband, whether the instrument under which she held gave her the power or not. It was an incident of separate ownership,¹⁸ both as to principal and income,¹⁹ whether her interest was vested or contingent upon her husband dying before her,²⁰ whether in possession or reversion,²¹ or

¹⁷ *Rich v. Cockell*, 9 Ves. Jun. 369, 376; *In re Smith's Estate*, *Clements v. Ward*, 35 Ch. Div. 589.

In *Fettiplace v. Gorges*, 1 Ves. Jun. 46, Lord Thurlow says: "I have always thought it settled that from the moment in which a woman takes personal property to her sole and separate use, from the same moment she has the right to dispose of it. . . . Upon the cases I have always taken this ground; that personal property the moment it can be enjoyed, must be enjoyed with all its incidents."

¹⁸ *Grigby v. Cox*, 1 Ves. Sen. 518; *Peacock v. Monk*, 2 Ves. Sen. 190; *Fettiplace v. Gorges*, 1 Ves. Jun. 46, 48; *Rich v. Cockell*, 9 Ves. Jun. 369, 375; *Tappenden v. Walsh*, 1 Phillim. 352; *Braham v. Burchell*, 3 Addams Ecc. 243; *Picquet v. Swan*, 4 Mason (U. S. C. C.) 455, Fed. Cas. No. 11133;

Barnes v. Irwin, 2 Dall. (U. S.) 199, 1 L. Ed. 348; *Michael v. Baker*, 12 Md. 158, 71 Am. Dec. 593; *Buchanan v. Turner*, 26 Md. 1; *Allen v. Little*, 5 Ohio 65; *West v. West's Exrs.*, 3 Rand. (Va.) 373. Denied as to realty in *Holman v. Perry*; 4 Metc. (Mass.) 492, 496; *Osgood v. Breed*, 12 Mass. 525; *Marston v. Norton*, 5 N. H. 205.

¹⁹ *Fettiplace v. Gorges*, 1 Ves. Jun. 46; *Ashton v. McDougal*, 5 Beav. 56; *Darkin v. Darkin*, 17 Beav. 578; *Scales v. Baker*, 28 Beav. 91; *Humphrey v. Richards*, 25 L. J. Ch. 442; *Herbert v. Herbert*, Prec. Ch. 44; *Gore v. Knight*, 2 Vern. 535; *Picquet v. Swan*, 4 Mason (U. S. C. C.) 455, Fed. Cas. No. 11133.

²⁰ *Bishop v. Wall*, 3 Ch. Div. 194.

²¹ *Sturgis v. Corp*, 13 Ves. Jun. 190; *Headen v. Rosher*, 1 McClel. & Y. 89.

whether the legal estate was in herself or in trustees.²² Savings out of an allowance for separate maintenance were considered in equity the same as separate estate;²³ savings out of pin-money, however, were the husband's.²⁴

§ 304. The Same Subject: Disability Removed by Husband's Death, and Other Causes.

A married woman whose husband had been banished for life by act of parliament, could make a will as though unmarried.²⁵ The same rule was applied to the wife of a convicted felon transported for life;²⁶ and civil death of a husband for a specific term only apparently removed the wife's disability during such time.²⁷ The death of the husband, of course, terminated the married life and the wife then became a *feme sole*;²⁸ but a former will invalid because executed during coverture was not thereby validated.²⁹

§ 305. The Same Subject: No Power to Devise Lands.

At common law a married woman could make no devise of any manors, lands, tenements or hereditaments, even

²² *Braham v. Burchell*, 3 Ad-dams Ecc. 263; *Hall v. Waterhouse*, 5 Giff. 64; *Rich v. Cockell*, 9 Ves. Jun. 369.

²³ *Brooke v. Brooke*, 25 Beav. 342; *In re Tharp*, L. R. 3 Prob. Div. 76.

Compare: *Messenger v. Clark*, 5 Ex. 388.

²⁴ *Jordell v. Jordell*, 9 Beav. 45; *Howard v. Digby*, 2 Clark & F. 634, 5 Sim. 330; *Barrack v. McCulloch*, 3 Kay & J. 114.

Contra: *Sugden's Law of Property*, 163.

²⁵ *Countess of Portland v. Producers*, 2 Vern. 104.

²⁶ *In re Martin*, 2 Roberts 405, s. c. 15 Jur. 686; *In re Coward*, 4 Sw. & Tr. 46.

See, post, §§ 401, 402, as affecting burden of proof.

²⁷ *Atlee v. Hook*, 23 L. J. Ch. 776; *Ex parte Franks*, 1 M. & Sc. 11, s. c. 7 Bing. 762. But, see, *Coombs v. Queen's Proctor*; 2 Roberts 547; s. c., 16 Jur. 820.

²⁸ *Osgood v. Breed*, 12 Mass. 525.

²⁹ See, post, §§ 306, 307, and notes; also §§ 401, 402, as affecting burden of proof.

with the consent of her husband, either to strangers or to himself. If a wife should devise such property to her husband, the devise was void because of the presumption that she did so only because of the constraint of the husband; and even if due proof was offered to the contrary, yet the devise was held void because of the general wording of the statute.³⁰

§ 306. The Same Subject: Effect of Subsequent Marriage of a Feme Sole, or Death of Husband, on Wills Theretofore Executed.

A devise by a single woman who thereafter married and whose husband survived her, was void, the rule being that it was not only necessary that the testatrix have the ability to make the devise at the time of the execution of the will, but also to have the same power

³⁰ *Scammell v. Wilkinson*, 2 East 552; *Barnes v. Irwin*, 2 Dall. (U. S.) 199, 1 L. Ed. 348; *Osgood v. Breed*, 12 Mass. 525; *Fitch v. Brainerd*, 2 Day (Conn.) 163.

The statute of 34 and 35 Henry VIII, ch. 5, section 14, provided: "That wills or testaments made of any manors, lands, tenements, or other hereditaments, by any woman covert, or person within the age of twenty-one years, idiot, or by any person of de non sane memory shall not be taken to be good or effectual in law."

In order that a husband might enable his wife during marriage to make a will of real estate, he had to join with her in conveying the same to a trustee, for such uses or trusts as might be agreed

upon. The husband, however, could only waive his right to an estate by curtesy, but could not remove the disability of a married woman to dispose of her real property against the claims of her heir.—*Peacock v. Monk*, 2 Ves. Sen. 190; *Hodsden v. Lloyd*, 2 Bro. C. C. 534, 544.

At common law, unless acting under a power of appointment, a married woman could not make a valid will devising real property, although with her husband's assent she could make a bequest of her personal estate to strangers.—*Nolin v. Pearson*, 191 Mass. 283, 77 N. E. 890, 6 Ann. Cas. 658, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 605; *Bunnell v. Hixon*, 205 Mass. 468, 91 N. E. 1022.

at the time of death. And further, if a married woman made such a devise, yet although she survived her husband the devise was void for the reason that she did not have capacity to make the will at the time of its execution. If, however, in the instance last mentioned, after the death of her husband she did confirm her will, then the devise was good by reason of the new declaration of the same; and if the will was made before marriage and the woman subsequently married and survived her husband, the will was valid the same as if she had never been married.³¹

§ 307. The Same Subject: Present Rule in England: Married Women's Property Act.

The Statute of Wills of 1 Victoria did not relieve married women of their disability to make testamentary dispositions of their property, nor validate wills executed

³¹ Swinb. Wills, pt. 2, § 9; Coke Litt. lib. 2, ch. 10, § 168, p. 112b.

'For if a feme sole makes her will on the first day of May, and gives land thereby, and afterwards on the tenth day of May she takes husband, who dies on the twentieth day of May, and afterwards the woman dies on the thirtieth day of May, the devise is good.'—By Manwood, in Plowd, 343 (*Brett v. Rigden*).

Contra: *Cotter v. Layer*, 2 P. Wms. 623, 624, wherein it was said that marriage alone by a woman was a revocation of a will theretofore executed. To the same effect, *George v. Jew*, Amb. 627; *Hodsdon v. Lloyd*, 2 Bro. C. C.

534; *Forse and Hembling's Case*, Coke's Rep., pt. 4, 60b, 61b.

The rule in the last named cases is that the making of the will is but the inception of it, and that it does not take effect until the death of the devisor; that a will is revocable at the wish of the testator and that therefore when a woman marries her act amounts to a revocation. In *Forse and Hembling's Case*, Coke's Rep., pt. 4, 60b, 61b, revocation by marriage and revocation by reason of subsequent insanity are distinguished, the first being by an act of the testator, the second being an act of God, the first being a revocation of the will, the second not.

while under such disability, even though it was thereafter removed.³² But thereafter, by the Married Women's Property Act of 1882,³³ additional testamentary powers were granted, and section 8 of the Wills Act of 1837 was impliedly repealed. Under this act of 1882, a married woman may acquire, hold and dispose of by will, or otherwise, any real and personal estate as her separate property, in the same manner as if she were a *feme sole*, without the intervention of a trustee. The act applied to women married both before and after its commencement, viz., January 1st, 1883; but as to those previously married, it affected only property rights acquired subsequent to such date. Separate property was defined as all real and personal property which—subsequent to the act—should belong to a married woman at the time of marriage or be acquired by or devolve upon her after marriage, including any wages, earnings, moneys or property acquired in any trade or employment, or through literary, artistic or scientific skill. Under the construction of the above statute, the will of a woman executed while married was not effectual, unless re-executed after she became single, to dispose of property acquired after the termination of coverture.³⁴ But by a later act³⁵ it is provided that

32 Statute of 1 Victoria, ch. 26, § 8, reads: "That no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act."

See, also, *Price v. Parker*, 16 Sim. 198; *Trimmell v. Fell*, 16 Beav. 537; *Willock v. Noble*, L. R. 7 H. L. 580.

33 Statute 45 and 46 Victoria, ch. 75, §§ 1, 2: The "object (of

the act) was to prevent a married woman's property from becoming her husband's property."—In *re Harkness and Allsopp's Contract*, (1896) 2 Ch. 358.

34 *Willock v. Noble*, L. R. 7 H. L. 580; In *re Price*, 23 Ch. Div. 709.

35 Statute of 56 and 57 Victoria, ch. 63, amending the Married Women's Property Act of 1882.

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section 24 of the Statute of Wills of 1 Victoria shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate estate at the time of execution; and it is not required that such will shall be re-executed. The section above referred to makes a will speak as of the date of the death of the testator, and therefore the rule now is that the will of a married woman passes her separate property acquired after a dissolution of the marital relation.

§ 308. The Common Law Rule in the United States as to the Disabilities of Married Women.

The modern tendency in the United States is to remove the disabilities of married women as to acquiring, holding and disposing of property and to place them on an equal footing with their husbands. There is a distinction, however, between transferring property by deed and dispos-

Act of 1907, Stat. 7 Edward VII, ch. 18, § 1, provides that a married woman may, without her husband, dispose of or join in disposing of real and personal property held by her solely or jointly with any other person as trustee or personal representative, in like manner as if she were a feme sole. In the case of *Harkness and Allsopp's Contract*, (1896) 2 Ch. 358, it had been held that the Married Women's Property Act of 1882 did not allow a woman married since that act, who was trustee for the sale of real estate, to convey the same to a purchaser unless with the concur-

rence of her husband. The above amendment reverses such rule.

The statute of 43 George III, ch. 108, authorizing devises and bequests of lands and chattels, to a limited amount, for the purpose of building and repairing churches, etc., excluded married women from the operation of the act. This disability was not removed by the subsequent Wills Act of 1837 or Married Women's Property Act of 1882, it being held that the general statute did not repeal the act imposing a special disability.—In *re Smith's Estate*, *Clements v. Ward*, 35 Ch. Div. 589.

ing of it by will. A statute which merely authorizes a married woman to hold, manage and convey property free from the control of her husband does not by implication extend to her the power of transmitting such property by will, but such right may of course be expressly granted.³⁶ The rules of the common law were accepted in this country by the original colonies and have continued, generally, to be effective except as altered by statute. It will be presumed, in absence of proof to the contrary, that the common law prevails in all territory thereafter becoming a part of these United States which was settled by the English or their American descendants. Where the government, however, was established before annexation, as in the case of Texas, the presumption does not apply, Texas having been originally part of the possessions of Spain.³⁷ Louisiana is another exception, its rules having been adopted from the civil law.³⁸ And in some of the Western and Southern states, notably Washington, Idaho, California, Nevada, Arizona, New Mexico, Texas and Louisiana, the rule of community property of husband and wife, adopted from the civil law of Spain, prevails. The right of a husband or a wife, however, to a share or all of the community property after the death of the other, merely imposes a limitation upon the right to dispose of the same by will.³⁹ The adoption of the plan

³⁶ *Harker v. Elliott*, 3 Har. (Del.) 51; *Cain v. Bunkley*, 35 Miss. 119; *Foote v. Nickerson*, 70 N. H. 496, 54 L. R. A. 554, 48 Atl. 1088; *Compton v. Pierson*, 28 N. J. Eq. 229; *Barnes v. Underwood*, 47 N. Y. 351, 353.

³⁷ *Castleman v. Jeffries*, 60 Ala. 380; *Norris v. Harris*, 15 Cal. 226; *Flato v. Mulhall*, 72 Mo. 522. The

same rule applies to Indian territory.—*Davison v. Gibson*, 56 Fed. 443, 5 C. C. A. 543.

³⁸ *Reynolds v. Swain*, 13 La. 193, 194.

³⁹ *Payne v. Payne*, 18 Cal. 291; *Box v. Word*, 65 Tex. 159; *Mayo v. Tudor's Heirs*, 74 Tex. 471, 12 S. W. 117; *In re Hill's Estate*, 6 Wash. 285, 33 Pac. 585.

of community or partnership property of the husband and wife, unless expressly so provided in the statute, would not affect or alter the common law rule as to the disability of married women to make testamentary dispositions of their estates.

§ 309. Construction of Statutes Removing the Disabilities of Married Women.

In the United States the disability of married women to devise or bequeath real or personal property has to a large extent been removed by statute. The effect of such laws is to grant to married women rights which they did not formerly possess, not to limit or restrict testamentary powers theretofore enjoyed;⁴⁰ and since such statutes alter the common law rule, they are strictly construed.⁴¹ They, however, must be read in connection with other laws on the same subject and thus, where a male or female under a prescribed age is not authorized to make a will, the fact of marriage does not confer such power.⁴² Where the law enables a married woman to dispose of her real and personal property without the consent of her husband, the common law restriction that a devise to her husband even with his consent is void, does not apply. The reason of the common law rule was that the wife and the husband were considered as one and that any act of a wife was accomplished under the dominion of the husband; thus it was considered as though it was a gift by

40 *Buchanan v. Turner*, 26 Md. 1; *Beach v. Manchester*, 2 Cush. (Mass.) 72; *Wakefield v. Phelps*, 37 N. H. 295.

See, post, §§ 401, 402, as to burden of proof.

41 *Harker v. Elliott*, 3 Har.

(Del.) 51; *Compton v. Pierson*, 28 N. J. Eq. 229.

42 *Scott v. Harkness*, 6 Idaho 736, 59 Pac. 556; *Zimmerman v. Schoenfeldt*, 3 Hun (N. Y.) 692; *Fisher v. Kimball*, 17 Vt. 323, 328.

the husband to himself,⁴³ although a bequest of personalty to a stranger, with the consent of the husband, was valid.⁴⁴

§ 310. Limitation Upon the Right of a Husband or Wife to Dispose of Property in Which the Law Gives the Other an Interest.

Under the modern doctrine obtaining in the United States, where the statute enables the wife to make a testamentary disposition of her real or personal property without the consent of her husband, she may dispose of the same to either her husband or to strangers, her will in either instance being equally valid. The statute, however, may limit the right of a married woman to dispose of her property only to those other than her husband,⁴⁵ and may provide that no such disposition shall affect his rights, such as curtesy or interest in community property. But even though the statute may be silent on the subject and may authorize a married woman to make any testamentary disposition of her real and personal estate which she may desire, yet without her husband's consent she

⁴³ *Barnes v. Irwin*, 2 Dall. (U. S.) 199, 202, 1 L. Ed. 348; *Hood v. Archer*, 1 McCord L. (S. C.) 225.

⁴⁴ *Willock v. Noble*, L. R. 7 H. L. 580; *Burton v. Holly*, 18 Ala. 408; *Osgood v. Breed*, 12 Mass. 525; *Sanborn v. Batchelder*, 51 N. H. 426; *Osmond's Estate*, 161 Pa. St. 543, 29 Atl. 266; *Hood v. Archer*, 1 McCord L. (S. C.) 225; *Fisher v. Kimball*, 17 Vt. 323.

⁴⁵ Estates by curtesy and in dower do not exist in Colorado, and under the laws of that state

a married woman has the same power of disposing of property by will as has her husband; yet the law limits both the husband and wife to a testamentary disposition of but one-half of his or her estate.—*Wells v. Caywood*, 3 Colo. 487; *Logan v. Logan*, 11 Colo. 44, 17 Pac. 99; *Schuler v. Henry*, 42 Colo. 367, 14 L. R. A. (N. S.) 1009, 94 Pac. 360; *Deutsch v. Rohlfing*, 22 Colo. App. 543, 126 Pac. 1123; *Rev. Stats. Colo.*, (1908) § 7070.

can not cut off his estate by curtesy, nor dispose of his interest in the community property against his will. In this regard, however, the husband is under the same disability as the wife.⁴⁶

§ 311. The General Principles Prevailing in the United States as to the Rights of Married Women.

The statutes regarding the rights of married women to make testamentary dispositions of their estates are not uniform and are subject to frequent modifications. The particular statute involved should be consulted in all cases. But the general rule is that the common law principles control except where altered or repealed by statute, and that a married woman can make a testamentary disposition of her estate only to the extent and in the particular manner allowed by law. In this connection, however, the distinction must be kept in mind between limitations upon testamentary power and restrictions as to particular property which may not be willed. If a married woman has the general right of devising and bequeathing her estate within certain limits, her will disposing of the

⁴⁶ *Cooper v. Macdonald*, 7 Ch. Div. 288; *Silsby v. Bullock*, 10 Allen (Mass.) 94; *Waters v. Herbert*, 178 Mo. 166, 77 S. W. 305; *Hayes v. Seavey*, 69 N. H. 308, 46 Atl. 189; *Vreeland's Exrs. v. Ryno's Exr.*, 26 N. J. Eq. 160; *Clarke's Appeal*, 79 Pa. St. 376; *Estate of Teacle*, (Appeal of Cooke) 132 Pa. St. 533, 19 Atl. 274; *Estate of Rouse v. Directors of Poor*, 169 Pa. St. 116, 32 Atl. 541; *Cunningham v. Cunningham*, 30 W. Va. 599, 5 S. E. 139.

Compare: *Pool v. Blakie*, 53 Ill.

495; *Matter of Mitchell* (In re Curtis' Will), 61 Hun (N. Y.) 372, 16 N. Y. Supp. 180; *Oatman v. Goodrich*, 15 Wis. 589.

Consent of husband, such as joining his wife in the execution of a deed to the property, cuts off his estate by curtesy.—*McBride's Estate*, 81 Pa. St. 303.

As to limitation of right of either spouse to dispose of such property, see, ante, §§ 251, 252.

As to consent of husband or wife and its effect, see, ante, §§ 253, 254.

same is valid, even though she attempts to transfer property contrary to some legal inhibition. Thus a devise by a wife of realty in which her husband has a community interest or an estate by curtesy, is valid except as to such property; and the husband has the right to elect to take under the provisions of the will, or demand the interest which would be his as in the event of intestacy.⁴⁷

47 "She (a married woman) may dispose of her property by will; and the law places both husband and wife upon the same level with reference to the disposition of property by will." The only restriction upon her absolute right to dispose of her estate by will was the one in favor of her husband, and that had no more to do with testamentary ability than had the corresponding limitation upon the right of the husband to dispose of his property by will. In neither case did the restriction affect the validity of the will; but it operated only upon the dispositive provisions thereof, in case the spouse of the testatrix or testator survived, and did not consent to the will.—*Deutsch v. Rohlfing*, 22 Colo. App. 543, 126 Pac. 1123; citing *Schuler v. Henry*, 42 Colo. 367, 14 L. R. A. (N. S.) 1009, 94 Pac. 360.

By the Massachusetts Rev. Laws, ch. 135, § 1, a married woman, if of full age and sound mind, can make a will with the same effect as if the marital relation did not exist, and by § 16, where no decree in her favor for separation has been entered under

Rev. Laws, ch. 153, § 36, the surviving husband within one year after probate may waive the will, and claim such portions of the estate as he would have taken if she had died intestate. The legislative purpose was to confer upon the surviving husband, not only a new, but an equal right with a surviving widow, to waive the will of the deceased spouse, and participate in the distribution of the estate as a statutory heir. The validity of the will of the testatrix was not dependent upon the husband's consent, but his act was only a waiver of his statutory rights as they then existed. Before the will took effect the statute was repealed, and under Rev. Laws, ch. 140, § 3, cl. 3, he became entitled, if she died intestate, to a much larger interest in her real and personal property. It therefore was not within her testamentary power at the time of her decease to deprive him of the right by proper proceedings, to claim and receive the same share or interest which he would have taken upon intestacy.—*Bunnell v. Hixon*, 205 Mass. 468, 91 N. E. 1022. See, also, Rev. Laws,

§ 312. Civil Death Generally.

A person may be naturally alive, yet civilly dead. At common law civil death resulted where one entered a monastery and became a professed monk, abjured the

ch. 135, §§ 4, 16; *Burroughs v. Nutting*, 105 Mass. 228; *Johnson v. Williams*, 152 Mass. 414, 25 N. E. 611; *Kelley v. Snow*, 185 Mass. 288, 70 N. E. 89.

The law of Tennessee in regard to the power of a married woman to dispose of her personal estate by will is well settled. She has the absolute power to dispose of personal property, held as a separate estate, without the consent of her husband. It is otherwise as to her general estate. In order to make a valid will of it, the husband must consent to the particular will made. His consent may be written or verbal, express or implied, but it must amount to a waiver of his marital right to the property disposed of. It may be given in the lifetime of the wife, or after her death, and after probate of the will it is irrevocable and binding upon him.—*Woods v. Shelton*, 126 Tenn. 607, 150 S. W. 856.

See, also, *George v. Bussing*, 15 B. Mon. (54 Ky.) 558; *Cutter v. Butler*, 25 N. H. 343, 57 Am. Dec. 330; *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384; *Kurtz v. Saylor*, 20 Pa. St. 205, 209.

As to limitation of right of either spouse to dispose of property in which law gives the other an interest, see, ante, §§ 251, 252.

As to consent of husband or wife to such a disposition, and its effect, see, ante, §§ 253, 254.

For cases involving the laws of various states regarding the right of married women to will their estates, see, generally, *Barnes v. Irwin*, 2 Dall. (U. S.) 199, 1 L. Ed. 348; *Hamilton v. Rathbone*, 175 U. S. 414, 44 L. Ed. 219, 20 Sup. Ct. 155; *Mosser v. Mosser's Exr.*, 32 Ala. 551; *Deutsch v. Rohlfing*, 22 Colo. App. 543, 126 Pac. 1123; *Rodney v. Burton*, 4 Boyce (27 Del.) 171, 86 Atl. 826; *Matter of Tuller's Will*, 79 Ill. 99, 22 Am. Rep. 164; *Noecker v. Noecker*, 66 Kan. 347, 71 Pac. 815; *George v. Bussing*, 15 B. Mon. (54 Ky.) 558; *Johnson v. Johnson*, 15 Ky. Law Rep. 587, 24 S. W. 628; *Schull v. Murray*, 32 Md. 9; *Kelley v. Snow*, 185 Mass. 288, 70 N. E. 89; *Bunnell v. Hixon*, 205 Mass. 468, 91 N. E. 1022; *Kelly v. Alred*, 65 Miss. 495, 4 So. 551; *Waters v. Herboth*, 178 Mo. 166, 77 S. W. 305; *Cutter v. Butler*, 25 N. H. 343, 347, 57 Am. Dec. 330; *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384; *Matter of Folwell's Estate*, 67 N. J. Eq., 570, 59 Atl. 467; *Wallace v. Bassett*, 41 Barb. (N. Y.) 92; *Kurtz v. Saylor*, 20 Pa. St. 205, 209; *Woods v.*

realm, or was outlawed.⁴⁸ A monk was accounted *civilliter mortuus*; upon entering the monastery he might make his testament and appoint his executor, otherwise his estate could be administered as if he had died intestate. This disability, however, was banished after the Reformation.⁴⁹ The practice once existed in England that if one who had committed a felony, not a sacrilege, sought refuge in a parish church, he might thereafter confess and take an oath to abjure the realm forever, in which event he became attainted with felony and had to leave the kingdom within forty days to the destination designated by the coroner. This custom was early abolished.⁵⁰ Banishment by transportation was authorized by the statutes of 4 George I, ch. 2, and 6 George I, ch. 23, of any person convicted of grand or petit larceny or of other crimes where the accused was not entitled to the benefit of clergy. This was the first legislation authorizing transportation as a punishment, but it had theretofore been practiced.⁵¹

§ 313. Outlawry Defined.

Outlawry was the punishment meted out in both civil and criminal suits to one who refused "to be amenable to, or abide by, the justice of that court which had lawful authority to call him before it." It was deemed an act of rebellion against the state. Originally the process of

Shelton, 126 Tenn. 607, 150 S. W. 856; *Dillard v. Dillard's Exrs.*, (Va.) 21 S. E. 669.

⁴⁸ 1 Bl. Com. **132, 133; *Coke Litt.* 132a, 133; *Bacon's Abr.* (Bouvier Ed.) Tit. Outlawry.

⁴⁹ 1 Bl. Com. **132, 133; *Canterbury's Case*, 2 *Coke* 48b.

⁵⁰ Statute 21 James 1, ch. 28; 1 Bl. Com. *132; *Rex v. Portington*, 1 Salk. 162; *Newsome v. Bowyer*, 3 P. Wms. 38, n.

⁵¹ *Bacon's Abr.* (Bouvier Ed.), Tit. Felony, H.; *Gould, J.*, in 2 H. Bl. 223.

outlawry lay only in cases of treason and felony, but it was later extended to trespass, and subsequently to debt, detinue, covenant, replevin, and such actions.⁵²

§ 314. Outlaws Denied the Right of Making Testamentary Dispositions.

At common law, a person outlawed was not under the protection of the prince; in fact he was beyond the aid of law. All his goods and chattels and the issues and profits of his real estate were forfeited to the crown. An outlaw, from whatsoever cause, was incapable of bequeathing personal property while such outlawry continued. During such period he could possess no personalty, and therefore had none to dispose of.⁵³ If outlawed because of treason, or a felony, there was an attainder of blood and an absolute forfeiture of all the convicted party's estate, real and personal; if for treason, the lands went to the king, no matter to whom holden; if for felony, they escheated to the lord of whom they were immediately holden. Consequently such outlaws could neither devise nor bequeath real or personal property. Pardon, however, removed the disability.⁵⁴ A *felo de se*, one who wilfully destroyed himself, was guilty of murder and for-

⁵² Bacon's Abr. (Bouvier Ed.), Tit. Outlawry, A; Reeves' Hist. of the Law, vol. I, 483, 484, vol. II, 439; 4 Bl. Com. *319.

⁵³ Swinburne Wills, pt. 2, § 21; 2 Bl. Com. *499; Bacon's Abr. (Bouvier Ed.), Tit. Outlawry, D. 1.

⁵⁴ Bacon's Abr. (Bouvier Ed.), Tit. Outlawry, D. 1, 2, and D. 2. 2; Swinburne Wills, pt. 2, § 12; 4 Bl. Com. **381, 382, 385.

Blackstone, contrary to the other citations above, holds that in the cases of petit treason and felony, the profits of lands are forfeited for life, and after the death of the guilty party, his real estate in fee simple goes to the crown for a year and a day.—2 Bl. Com. *385. But, see, 4 Bl. Com. **387, 388, regarding attainder as an immediate consequence.

feited his chattels, real and personal, upon self murder being found by some inquisition, but his blood was not corrupted, nor did his lands escheat.⁵⁵

§ 315. Attainder and Corruption of Blood.

Attainder was an immediate consequence of a judgment of death for treason or felony, the result being corruption of blood and forfeiture of all real and personal property.⁵⁶ One attainted could neither inherit real property from his ancestors, hold that already in his possession, nor transmit it to his heir. His posterity could inherit no property the title to which was traced through him.⁵⁷

§ 316. The Same Subject: Statutory Regulations in England.

The rule as to attainder and corruption of blood was relaxed and finally, in effect, abolished. By the statute of

See, also, Swinh., pt. 2, § 13.

"Such persons as are intestable for want of liberty or freedom of will, are, by the civil law, of various kinds; as prisoners, captives, and the like. But the law of England does not make such persons absolutely intestable; but only leaves it to the discretion of the court to judge, upon the consideration of their particular circumstances or duress, whether or no such persons could be supposed to be *liberum animum testandi*.—2 Bl. Com. *497. As to the rule of the civil law, see Godolph, pt. 1, ch. 9; Swinburne Wills, pt. 2, § 8.

⁵⁵ Bacon's Abr. (Bouvier Ed.)
Tit. *Felo De Se*, c.

⁵⁶ Bacon's Abr. (Bouvier Ed.)

Tit. Outlawry, D. 1, & D. 2; 4 Bl. Com. **381, 382.

⁵⁷ 4 Bl. Com. *388.

It has been said in some cases that attainder did not deprive the one attainted of the right to devise his lands held in possession or to take lands by purchase or descent, but that such transfers were good against all the world except the crown and that there was no forfeiture until office found.—*Doe v. Pritchard*, 5 Barn. & Ad. 765; *La Chapelle v. Burpee*, 69 Hun (N. Y.) 436, 23 N. Y. Supp. 453; *Avery v. Everett*, 110 N. Y. 317, 325, 6 Am. St. Rep. 368, 1 L. R. A. 264, 18 N. E. 148; *Stephani v. Lent*, 30 Misc. Rep. 346, 63 N. Y. Supp. 471.

33 and 34 Victoria, ch. 28, it is provided that no forfeiture, escheat or corruption of blood shall be caused by conviction or proof of treason, felony, or *felo de se*. Those, however, sentenced to death or penal servitude for treason or felony are, until death, bankruptcy, completion of sentence, or pardon, civilly dead. The act provides for the appointment of an administrator to take all the estate of the convict, lease, sell or mortgage the property; and fully administer the same during the period of disability. Upon the termination of such disability, the property, including all proceeds, goes to the convict, his heirs or personal representatives. Although an alienation of property by deed is prohibited, yet since a will passes property only after the death of the testator, the convict is free to devise and bequeath his estate.⁵⁸

⁵⁸ Statute of 33 and 34 Victoria, ch. 23 (July 4, 1870), section 1, reads as follows: "From and after the passage of this act, no conviction, verdict, inquest, confession or judgment of or for any treason or felony or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat, providing that nothing in this act shall effect the law of forfeiture consequent on outlawry." Section 8 of the above statute provides that no person condemned to death or to penal servitude for treason or felony, can bring any action at law or suit in equity for the recovery of property, or alienate any property or make any contract during the time that the judgment is in effect. The act provides that the

Crown may appoint administrators of the convict's property who administer the same, and that it reverts to the convict or his representatives upon completion of his sentence or upon his death. The above act provides that it should not extend to Scotland.

By the statute of 2 Henry V. ch. 7, the lands and chattels of those convicted of heresy were forfeited to the Crown. But this law was repealed by the statute of 1 Elizabeth, ch. 1, section 15.

Statute of 9 George IV, ch. 31 (A. D. 1828), section 2, provided that what, prior to the statute amounted to petit treason, should thereafter be deemed to be murder only.

The Statute of 30 George III, ch. 48 (A. D. 1790), related to women

§ 317. Bills of Attainder and Corruption of Blood in the United States: Constitutional Provision.

Outlawry, in the common law sense, does not now obtain in the United States.⁵⁹ Previous to the adoption of the Constitution of these United States, bills of attainder and confiscation of property might be had unless prohibited by the constitution of a state.⁶⁰ But by the federal constitution, the various states were prohibited from passing any bill of attainder.⁶¹ Such a bill "may affect the life of an individual, or may confiscate his property, or both."⁶² Congress has the power "to declare the punishment for treason, but no attainder of treason shall

convicted of high treason or petit treason and provided that upon conviction of such crimes or of abetting, procuring, or counseling the same, in addition to the penalty of death, they should also be subject to the forfeitures and corruption of blood as they would have been before the passage of the act.

Statute of 54 George III, ch. 145 (A. D. 1814), provided that no attainder for felony which should take place after the passage of the act, except in cases of high treason, petit treason, or murder, or of abetting, procuring or counseling the same, should extend to the disinheriting of any heir or to the prejudice of any right or title of any person other than the right or title of the offender during his or her natural life; and that it should be lawful for every person to whom a right or interest in lands, tenements or

hereditaments, after the death of such offender, should or might have appertained if no such attainder had been, to enter into the same.

⁵⁹ *Respublica v. Doan*, 1 Dall. (U. S.) 86, 1 L. Ed. 47; *Respublica v. Steele*, 2 Dall. (U. S.) 92, 1 L. Ed. 303; *Dale County v. Gunter*, 46 Ala. 118, 138; *Drew v. Drew*, 37 Me. 389, 391; *St. Louis v. Toney*, 21 Mo. 243, 256; *Vasquez v. Ewing*, 42 Mo. 247.

⁶⁰ *Respublica v. Chapman*, 1 Dall. (U. S.) 53, 59, 1 L. Ed. 33; *Copper v. Telfair*, 4 Dall. (U. S.) 14, 1 L. Ed. 721.

⁶¹ Const. U. S. Art. 1, § 10.

⁶² *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 138; 3 L. Ed. 162, 178.

See, also, *Cummings v. Missouri*, 4 Wall. (U. S.) 277, 18 L. Ed. 356; *Kilbourn v. Thompson*, 103 U. S. 168, 182, 26 L. Ed. 377; *Cozens v. Long*, 3 N. J. Law 764; *Green v. Shumway*, 39 N. Y. 418,

work corruption of blood, or forfeiture of property except during the life of the person attainted.”⁶³

§ 318. Civil Death Because of Conviction of a Felony.

There is no federal constitutional inhibition against the states of the Union passing general laws which will deprive a person convicted of a felony of his civil rights, and in some of the states such laws have been enacted. They do not violate the federal constitution, the limitation being that there must be no confiscation of property or corruption of blood. As to the punishment for treason, that is fixed by Congress.

In California, for instance, it is provided that a person sentenced to imprisonment in the state's prison for life is thereafter deemed civilly dead, while imprisonment for a term less than life suspends the civil rights of the convict during such period.⁶⁴ All forfeitures to the state, in the nature of a deodand, or where the person shall flee from justice, are abolished.⁶⁵ Under statutes such as the above, it is held that civil death imparts a depriva-

430; *People v. Hayes*, 140 N. Y. 484, 37 Am. St. Rep. 572, 23 L. R. A. 830, 35 N. E. 951.

⁶³ Const. U. S. Art. 3, § 3.

See, also, Confiscation cases, 1 Woods (U. S. C. C.) 221, Fed. Cas. No. 3097.

“An act of Congress which proposed to adjudge a man guilty of a crime and inflict the punishment would be conceded by all thinking men to be unauthorized by anything in the constitution.”—*Kilbourn v. Thompson*, 103 U. S. 168, 182, 26 L. Ed. 377, 384; Act of Congress, 1 U. S. Stats. L., ch.

9, p. 211, prescribes death as the penalty for treason.

⁶⁴ Cal. Civ. Code, §§ 673, 674; *Estate of Donnelly*, 125 Cal. 417, 73 Am. St. Rep. 62, 58 Pac. 61.

⁶⁵ Cal. Civ. Code, § 677; *Harlan v. Schulze*, 7 Cal. App. 287, 294, 94 Pac. 379; *Estate of Donnelly*, 125 Cal. 417, 73 Am. St. Rep. 62, 58 Pac. 61.

A convict sentenced for life may be a witness in a criminal action and may make and acknowledge a sale or conveyance of property. His person is also

tion of all rights, the exercise or enjoyment of which depends on some provision of positive law. The right of inheritance was held to be such a right, and one imprisoned under sentence for life was held not entitled to inherit any portion of the estate of his father who died during such imprisonment.⁶⁶ Such statutes, however, enacted by a state legislature, apply only to those convicted and sentenced by the state courts; they have no application to those under sentence by the federal courts where such statutes do not obtain, and in the absence of legislation depriving a convict of civil rights, no disability exists.⁶⁷

protected.—Cal. Civ. Code, §§ 675, 676.

The rights of creditors of a person sentenced to imprisonment for life are not suspended.—*Coffee v. Haynes*, 124 Cal. 561, 71 Am. St. Rep. 99, 57 Pac. 482, criticising *Estate of Nerac*, 35 Cal. 392, 396, 95 Am. Dec. 111.

To the same effect, *Gray v. Gray*, 104 Mo. App. 520, 79 S. W. 505; *Guarantee Co. of North America v. First National Bank*, 95 Va. 480, 28 S. E. 909.

⁶⁶ *Estate of Donnelly*, 125 Cal. 417, 73 Am. St. Rep. 62, 58 Pac. 61.

See, also, *Avery v. Everett*, 110 N. Y. 317, 332, 6 Am. St. Rep. 368, 1 L. R. A. 264, 18 N. E. 148. Kan. Code Crim. Pro. § 337, provides that the estate of one under sentence of imprisonment for life shall be administered and disposed of in all respects as if he were naturally dead. This does not include those sentenced to

death.—*Gray v. Stewart*, 70 Kan. 429, 109 Am. St. Rep. 461, 78 Pac. 852.

See, also, *Smith v. Becker*, 62 Kan. 541, 53 L. R. A. 141, 64 Pac. 70, as to the effect of the Kansas Statute.

The effect of the Missouri Statute is that the property of a convicted felon is not forfeited, but he is deprived of all dominion over the same during his imprisonment. If sentenced for life, it passes to his heirs or legal representatives.—*Williams v. Shackelford*, 97 Mo. 322, 11 S. W. 222.

⁶⁷ *Presbury v. Hull*, 34 Mo. 29; *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118.

Imprisonment for life does not in itself constitute civil death.—*Cannon v. Windsor*, 1 Houst. (Del.) 143, 144; *Willingham v. King*, 23 Fla. 478, 2 So. 851; *Frazer v. Fulcher*, 17 Ohio 260; *Commonwealth v. Clemmer*, 190 Pa.

§ 319. Disabilities of Aliens: English Rule.

Every nation has the inherent and natural right to prescribe and enforce rules and regulations as to aliens acquiring, holding or disposing of property.

As to real property, the rule of the common law was that aliens could not hold lands either by purchase, devise or inheritance; nor could they devise lands, since they were incapable of holding. They could neither inherit real property nor pass the same to their heirs; in fact, they were held to have no inheritable blood. The reason was partly a matter of national policy, also the holding of real property by one owing no allegiance to the crown was contrary to the principles of feudalism.⁶⁸ The rule was gradually relaxed under subsequent statutes.⁶⁹ The prohibition against aliens taking land by deed or devise or making testamentary dispositions of the same, was not absolute, but the crown was entitled, by inquest of office, to seize such lands either in the hands of the alien or of the devisee. Until office found the alien could remain in possession.⁷⁰ But an alien could not take lands by descent, since title in such manner vests by operation of law and the law would not vest

St. 202, 42 Atl. 675; *Kenyon v. Saunders*, 18 R. I. 590, 26 L. R. A. 232, 30 Atl. 470; *Davis v. Laning*, 85 Tex. 39, 34 Am. St. Rep. 784, 18 L. R. A. 82, 19 S. W. 846; *Baltimore v. Chester*, 53 Vt. 315, 38 Am. Rep. 677.

⁶⁸ 2 Bl. Com. **249, 250.

⁶⁹ 11 & 12 William III, ch. 6; 25 George II, ch. 39.

⁷⁰ 1 Bl. Com. **372, 373.

"If an alien Christian or infidel purchase houses, lands, tene-

ments, or hereditaments to him and his heirs, albeit he can have no heirs, yet he is of capacity to take a fee simple but not to hold. For upon an office found, the king shall have it by his prerogative, of whomsoever the land is holden. And so it is if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king."—Coke Litt. lib. 1, ch. 1, § 1, p. 2b.

title to lands in one prohibited from holding them.⁷¹ The rule was materially modified by the statute of 7 and 8 Victoria, ch. 66, which, however, referred only to alien friends.⁷² But by the naturalization act of 1870, the rule of the common law was abolished and since that time,

71 2 Bl. Com. *249.

"If an alien cometh into England, and there hath issue two sons, who are thereby natural born subjects; and one of them purchases land and dies; yet neither of these brethren can be heir to the other. For the commune vinculum, or common stock of their consanguinity, is the father; and as he has no inheritable blood in him, he could communicate none to his sons; and when the sons can by no possibility be heirs to the father, the one of them shall not be heir to the other."—2 Bl. Com. *250, referring to the rule laid down in Coke on Littleton. This rule was overturned and it was held the law that one of such brothers could inherit from the other, the descent from one to the other being held an immediate descent.—2 Bl. Com. *226; *Collingwood v. Pace*, 1 Keble 65. This last named case is reviewed at length in *Levy v. M'Cartee*, 6 Pet. (U. S.) 102, 8 L. Ed. 334 and *McGregor v. Comstock*, 3 N. Y. 408.

See, also, *Doe v. Acklam*, 2 B. & C. 779; *Doe v. Jones*, 4 T. R. 300; *Doe v. Clarke*, 1 U. C. Q. B. 37; *Iler v. Elliott*, 32 U. C. Q. B. 434.

72 Statute of 7 and 8 Victoria, ch. 66, § 4, reads as follows: "That from and after the passing of this act (August 6, 1844) every alien, being the subject of a friendly State, shall and may take and hold, by purchase, gift, bequest, representation, or otherwise, every species of personal property, except chattels real, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions, privileges, and capacities, as if he were a natural-born subject of the United Kingdom."

Sections 3 and 5 of the above act read as follows: § 3. "That every person now born, or hereafter to be born, out of her Majesty's dominions, of a mother being a natural-born subject of the United Kingdom, shall be capable of taking to him, his heirs, executors, or administrators, any estate, real or personal, by devise or purchase, or inheritance of succession."

§ 5. "That every alien now residing in, or who shall hereafter come to reside in, any part of the United Kingdom, and being the subject of a friendly state, may, by grant, lease, demise, assignment, bequest, representation, or

in England, all aliens, whether friends or foes, are allowed to acquire, hold and dispose of real and personal property in the same manner as natural born British subjects.⁷³

As to personal property, the common law rule was that alien friends could acquire or dispose of such property by will; alien enemies, however, had no rights or privileges except as allowed by the crown.⁷⁴

otherwise, take and hold any lands, houses, or other tenements, for the purpose of residence or for the occupation by him or her, or his or her servants, or for the purpose of any business, trade, or manufacture, for any term of years, not exceeding twenty-one years, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions, and privileges, except the right to vote at elections for members of Parliament, as if he were a natural-born subject of the United Kingdom."

The statute of 7 and 8 Victoria, ch. 66, by section 15 did not take away any rights of aliens theretofore existing, and by § 16 provided that any woman married or who should be married to a natural-born or naturalized British subject should be deemed and taken to be herself naturalized.

⁷³ Statute of 33 and 34 Victoria, ch. 14 (May 12, 1870), § 2, reads in part as follows: "Real and personal property of every description may be taken, acquired, held, and disposed of by any alien in

the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject." The section provides, however, that it confers no rights on aliens to hold real property out of the United Kingdom, nor qualifies aliens to hold office, nor entitles them to any rights and privileges of British subjects except with respect to property; neither does the section affect any estate or interest in real or personal property in pursuance of any disposition or devolution by law before the passing of the act. It will be noted that the above act included all aliens, and was not confined to alien friends as was the statute of 7 and 8 Victoria, ch. 66.

⁷⁴ 1 Bl. Com. *372; 2 Kent Com. **62, 63; *Calvin's Case*, 7 Coke 1; *Fourdrin v. Gowdey*, 3 Myl. & K. 383.

§ 320. The Same Subject: American Rule.

The rule of the common law became the rule of the United States and, except where modified by treaty or by statute, prevents an alien from inheriting real property;⁷⁵ and an alien, having no inheritable blood, can not have an heir to whom his real property will descend

⁷⁵ *Brigham v. Kenyon*, 76 Fed. 30; *Pacific Bank v. Hannah*, 90 Fed. 72, 32 C. C. A. 522; *Dawson v. Godfrey*, 4 Cranch (U. S.) 323, 2 L. Ed. 634; *Fairfax v. Hunter*, 7 Cranch (U. S.) 603, 3 L. Ed. 453; reaffirmed 1 *Wheat.* (U. S.) 304, 4 L. Ed. 97; *Orr v. Hodgson*, 4 *Wheat.* (U. S.) 453, 4 L. Ed. 613; *McCreery v. Somerville*, 9 *Wheat.* (U. S.) 354, 6 L. Ed. 109; *Taylor v. Benham*, 5 *How.* (U. S.) 233, 12 L. Ed. 130; *McKinney v. Saviego*, 18 *How.* (U. S.) 235, 15 L. Ed. 365; *Phillips v. Moore*, 100 U. S. 208, 25 L. Ed. 603; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628; *Sullivan v. Burnett*, 105 U. S. 334, 26 L. Ed. 1124; *Hanrick v. Patrick*, 119 U. S. 156, 30 L. Ed. 396, 7 *Sup. Ct.* 147; *Geofroy v. Riggs*, 133 U. S. 258, 265, 33 L. Ed. 642, 10 *Sup. Ct.* 295; *Blythe v. Hinckley*, 180 U. S. 333, 45 L. Ed. 557, 21 *Sup. Ct.* 390; *Smith v. Zaner*, 4 *Ala.* 99; *Donovan v. Pitcher*, 53 *Ala.* 411, 25 *Am. Rep.* 634; *Farrell v. Enright*, 12 *Cal.* 450; *Matter of Pendergast's Estate*, 143 *Cal.* 135, 76 *Pac.* 962; *Crosgrove v. Crosgrove*, 69 *Conn.* 416, 38 *Atl.* 219; *State v. Stevenson*, 6 *Idaho* 367, 55 *Pac.* 886; *De Graff v. Went*, 164 *Ill.* 485, 45

N. E. 1075; *Meadowcroft v. Winnebago County*, 181 *Ill.* 504, 54 *N. E.* 949; *Donaldson v. State* (*Ind.*), 67 *N. E.* 1029; *Burrow v. Burrow*, 98 *Iowa* 400, 67 *N. W.* 287; *Smith v. Lynch*, 61 *Kan.* 609, 60 *Pac.* 329; *Trimbles v. Harrison*, 1 *B. Mon.* (40 *Ky.*) 140; *Yeaker's Heirs v. Yeaker's Heirs*, 4 *Metc. (Ky.)* 33, 81 *Am. Dec.* 530; *Utassy v. Giedinghagen*, 132 *Mo.* 53, 33 *S. W.* 444; *Pembroke v. Huston*, 180 *Mo.* 627, 79 *S. W.* 470; *Glynn v. Glynn*, 62 *Neb.* 872, 87 *N. W.* 1052; *Dougherty v. Kubat*, 67 *Neb.* 269, 93 *N. W.* 317; *Montgomery v. Dorion*, 7 *N. H.* 475; *Parish v. Ward*, 28 *Barb. (N. Y.)* 328; *Renner v. Muller*, 57 *How. Pr. (N. Y.)* 229; *Jackson v. FitzSimmons*, 10 *Wend. (N. Y.)* 9, 24 *Am. Dec.* 198; *Smith v. Smith*, 70 *App. Div. (N. Y.)* 286, 74 *N. Y. Supp.* 967; *Halyburton v. Kershaw*, 3 *Desaus. (S. C.)* 105; *Hardy v. De Leon*, 5 *Tex.* 211.

No distinction is drawn between alien friends and alien enemies.—*Fairfax v. Hunter*, 7 *Cranch* (U. S.) 602, 3 L. Ed. 453; reaffirmed 1 *Wheat.* (U. S.) 304, 4 L. Ed. 97; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628.

should he die intestate.⁷⁶ An alien in the chain of descent prevents the title to lands from passing through him to his heirs.⁷⁷ This, however, applies only where the alien is the medium through which the title must pass; since the alien can not take title by descent, he can not transmit it. But the rule does not prevent one citizen from inheriting from another, although the common ancestor of both was an alien, if the title can pass direct or immediately from one to another, a celebrated case being that of one brother inheriting from another, although their father was an alien.⁷⁸ But upon the death of an alien intestate, and the person to whom his real property

⁷⁶ *Levy v. M'Cartee*, 6 Pet. (U. S.) 102, 8 L. Ed. 334; *Orr v. Hodgson*, 4 Wheat. (U. S.) 453, 4 L. Ed. 613; *Blight v. Rochester*, 7 Wheat. (U. S.) 535, 5 L. Ed. 516; *Doe v. Lazenby*, 1 Ind. 234; *People v. Conklin*, 2 Hill (N. Y.) 67. See, also, cases cited in preceding note; also, *Irwin v. McBride*, 23 U. C. Q. B. 570; *Montgomery v. Graham*, 31 U. C. Q. B. 57.

⁷⁷ *Levy v. M'Cartee*, 6 Pet. (U. S.) 102, 8 L. Ed. 334; *Meadowcroft v. Winnebago County*, 181 Ill. 504, 54 N. E. 949; *Eldon v. Doe*, 6 Blackf. (Ind.) 341; *Murray v. Kelly*, 27 Ind. 42; *Donaldson v. State*, (Ind.) 67 N. E. 1029; *Furenes v. Mickelson*, 86 Iowa 508, 53 N. W. 416; *Wilcke v. Wilcke*, 102 Iowa 173, 71 N. W. 201; *Meier v. Lee*, 106 Iowa 303, 76 N. W. 712; *Smith v. Lynch*, 61 Kan. 609, 60 Pac. 329; *Redpath v. Rich*, 3 Sandf. (N. Y.) 79; *Jackson v. Green*, 7 Wend. (N. Y.) 333;

Jackson v. Fitz Simmons, 10 Wend. (N. Y.) 9, 24 Am. Dec. 198. Contra: *Campbell's Appeal*, 64 Conn. 277, 292, 24 L. R. A. 667, 29 Atl. 494.

⁷⁸ *Collingwood v. Pace*, 1 Keble 65; *Levy v. M'Cartee*, 6 Pet. (U. S.) 102, 8 L. Ed. 334; *Wilcke v. Wilcke*, 102 Iowa 173, 71 N. W. 201; *Smith v. Mulligan*, 11 Abb. Pr. N. S. (N. Y.) 438; *Jackson v. Green*, 7 Wend. (N. Y.) 333, 335; *Parish v. Ward*, 28 Barb. (N. Y.) 328; *McGregor v. Comstock*, 3 N. Y. 408.

See, also, 2 Bl. Com. **226, 250; *Slater v. Nason*, 15 Pick. (Mass.) 345.

If a citizen dies intestate and leaves issue who are aliens, the property descends to the next of kin who may inherit, the alien issue being considered as non-existing.—*Orr v. Hodgson*, 4 Wheat. (U. S.) 453, 4 L. Ed. 613.

would otherwise descend being likewise an alien, the estate is held to escheat to the state without inquest of office or office found.⁷⁹

§ 321. The Same Subject: Distinction Between Title to Real Property Passing by Operation of Law and by Act of the Parties.

A distinction is made between a case where lands are acquired by act of the parties and one where title passes by operation of law. A devise is considered an act of the parties the same as a deed; thus, while an alien can not take lands under the law of succession from an intestate decedent, yet he may acquire title by deed or de-

79 *Pacific Bank v. Hannah*, 90 Fed. 72, 32 C. C. A. 522; *Contree v. Godfrey*, 1 Cranch (U. S. C. C.) 479, Fed. Cas. No. 3140; *Fairfax v. Hunter*, 7 Cranch (U. S.) 603, 3 L. Ed. 453; *Taylor v. Benham*, 5 How. (U. S.) 233, 12 L. Ed. 130; *McKinney v. Saviego*, 18 How. (U. S.) 235, 15 L. Ed. 365; *Bartlett v. Morris*, 9 Port. (Ala.) 266, 270; *Etheridge v. Doe*, 18 Ala. 565; *State v. Stevenson*, 6 Idaho 367, 55 Pac. 886; *Wunderle v. Wunderle*, 144 Ill. 40, 19 L. R. A. 84, 33 N. E. 195; *Meadowcroft v. Winnebago County*, 181 Ill. 504, 54 N. E. 949; *Donaldson v. State*, (Ind.) 67 N. E. 1029; *Purczell v. Smidt*, 21 Iowa 540; *Madden v. State*, 68 Kan. 658, 75 Pac. 1023; *Trimbles v. Harrison*, 1 B. Mon. (40 Ky.) 140; *Slater v. Nason*, 15 Pick. (Mass.) 345; *Fox v. Southack*, 12 Mass. 143; *Crane v. Reeder*, 21

Mich. 24, 4 Am. Rep. 430; *Farrar v. Dean*, 24 Mo. 16; *Pembroke v. Huston*, 180 Mo. 627, 79 S. W. 470; *Montgomery v. Dorion*, 7 N. H. 475; *Colgan v. McKeon*, 24 N. J. Law 566; *Jackson v. Adams*, 7 Wend. (N. Y.) 367; *McGillis v. McGillis*, 154 N. Y. 532, 49 N. E. 145; *Richardson v. Amsdon*, 85 N. Y. Supp. 342; *Rubeck v. Gardner*, 7 Watts (Pa.) 455; *Hinkle's Lessee v. Shadden*, 2 Swan (32 Tenn.) 46.

If the title of the deceased alien to real property is evidenced by a warranty deed from the State itself, the rule has been held not to apply, but the property passes to the alien's heirs.—*Commonwealth v. Andre's Heirs*, 3 Pick. (Mass.) 224; *Goodell v. Jackson*, 20 Johns. (N. Y.) 693, 707, 11 Am. Dec. 351.

wise.⁸⁰ Such title, however, is defeasible, and may be divested by office found or by legislative enactment; but until such action is taken the state does not acquire the title, and until then the alien may hold the property.⁸¹ If, however, the alien becomes naturalized before for-

⁸⁰ *Brigham v. Kenyon*, 76 Fed. 30; *Lohmann v. Helmer*, 104 Fed. 178; *Fairfax v. Hunter*, 7 Cranch (U. S.) 603, 619, 620, 3 L. Ed. 453; reaffirmed 1 Wheat. (U. S.) 304, 4 L. Ed. 97; *Orr v. Hodgson*, 4 Wheat. (U. S.) 453, 4 L. Ed. 613; *Conrad v. Waples*, 96 U. S. 279, 289, 24 L. Ed. 721; *Airhart v. Massieu*, 98 U. S. 491, 493, 25 L. Ed. 213; *Phillips v. Moore*, 100 U. S. 208, 212, 25 L. Ed. 603; *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563, 46 L. Ed. 331, 22 Sup. Ct. 84; *Harley v. State*, 40 Ala. 689; *Wunderle v. Wunderle*, 144 Ill. 40, 19 L. R. A. 84, 33 N. E. 195; *Donaldson v. State*, (Ind.) 67 N. E. 1029; *Easton v. Huott*, 95 Iowa 473, 31 L. R. A. 177, 64 N. W. 408; *Burrow v. Burrow*, 98 Iowa 400, 67 N. W. 287; *Madden v. State*, 68 Kan. 658, 75 Pac. 1023; *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; *Fox v. Southack*, 12 Mass. 143; *Pembroke v. Huston*, 180 Mo. 627, 79 S. W. 470; *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360; *Richardson v. Amsdon*, 85 N. Y. Supp. 342; *Marx v. McGlynn*, 88 N. Y. 357; *Quinn v. Ladd*, 37 Or. 261, 272, 59 Pac. 457; *Vaux v. Nesbit*, 1 McCord

Eq. (S. C.) 352; *Marshall v. Conrad*, 5 Call (Va.) 364.

⁸¹ *Billings v. Aspen Min. & S. Co.*, 51 Fed. 338, 342, 2 C. C. A. 252; *Taylor v. Benham*, 5 How. (U. S.) 233, 12 L. Ed. 130; *Craig v. Radford*, 3 Wheat. (U. S.) 594, 4 L. Ed. 467; *Doe v. Robertson*, 11 Wheat. (U. S.) 332, 355, 6 L. Ed. 488; *Fairfax v. Hunter*, 7 Cranch (U. S.) 603, 618, 3 L. Ed. 453; *Airhart v. Massieu*, 98 U. S. 491, 498, 25 L. Ed. 213; *Manuel v. Wulff*, 152 U. S. 506, 38 L. Ed. 532, 14 Sup. Ct. 651; *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563, 571, 46 L. Ed. 331, 22 Sup. Ct. 84; *People v. Folsom*, 5 Cal. 373; *De Merle v. Mathews*, 26 Cal. 455, 477; *Halstead v. Board of Comrs. of Lake County*, 56 Ind. 363; *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430; *Jackson v. Adams*, 7 Wend. (N. Y.) 367.

The title of an alien can not be attacked in a collateral proceeding.—*Osterman v. Baldwin*, 6 Wall. 116, 121, 18 L. Ed. 730; *Phillips v. Moore*, 100 U. S. 208, 25 L. Ed. 603; *Racouillat v. Sansevain*, 32 Cal. 376; *Justice Mining Co. v. Lee*, 21 Colo. 260, 263, 52 Am. St. Rep. 216, 40 Pac. 444; *Lenahan v. Spaulding*, 57 Vt. 115.

feiture has been decreed, the right of the state to a forfeiture is waived and the title in the alien becomes effective for all purposes;⁸² but naturalization will not affect a title already escheated to the state or vested in another by descent.⁸³

§ 322. The Same Subject: As to Personal Property.

As to personal property, the disabilities of aliens regarding real property do not obtain. Alien friends may acquire and transmit personalty in the same manner as citizens of this country.⁸⁴ Real property, which by the will of the deceased is directed to be sold and converted into money and the proceeds distributed, is considered

⁸² *Lone Jack Min. Co. v. Megginson*, 82 Fed. 89, 27 C. C. A. 63; *Gouverneur v. Robertson*, 11 Wheat. (U. S.) 332, 6 L. Ed. 488; *Manuel v. Wulff*, 152 U. S. 505, 38 L. Ed. 532, 14 Sup. Ct. 651; *Harley v. State*, 40 Ala. 689; *Pembroke v. Huston*, 180 Mo. 627, 79 S. W. 470.

⁸³ *White v. White*, 2 Metc. (Ky.) 185; *Foss v. Crisp*, 20 Pick. (Mass.) 121; *Keenan v. Keenan*, 7 Rich. L. (S. C.) 345.

As to the rule of the civil law, which required a proceeding similar in effect to inquest of office, in order that the fact of alienage should be established, see *Phillips v. Moore*, 100 U. S. 208, 212, 25 L. Ed. 603.

⁸⁴ 2 Kent Com. **62, 63; *Du Hourmelin v. Sheldon*, 1 Beav. 79; *a. c.*, 4 Myl. & Cr. 525; *Ruckgaber*

v. Moore, 104 Fed. 947, 31 Civ. Proc. Rep. 310; *Craig v. Leslie*, 3 Wheat. (U. S.) 563, 4 L. Ed. 460; *M'Learn v. Wallace*, 10 Pet. (U. S.) 625, 637, 9 L. Ed. 559; *Evan's Appeal*, 51 Conn. 435; *Crosgrove v. Crosgrove*, 69 Conn. 416, 38 Atl. 219; *Cleveland etc. Ry. Co. v. Osgood*, 36 Ind. App. 34, 73 N. E. 285; *Greenheld v. Morrison*, 21 Iowa 538; *Sala's Succession*, 50 La. Ann. 1009, 24 So. 674; *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 165; *Harney v. Donohoe*, 97 Mo. 141, 10 S. W. 191; *Bradwell v. Weeks*, 1 Johns. Ch. (N. Y.) 206; *Beck v. McGillis*, 9 Barb. (N. Y.) 35; *Tanas v. Municipal Gas Co.*, 88 App. Div. 251, 84 N. Y. Supp. 1053; *Megrath v. Robertson's Admr.*, 1 Desaus. (S. C.) 445.

as personalty, and a bequest of such proceeds to an alien is valid.⁸⁵

§ 323. The Same Subject: Disabilities of Alien Enemies.

All property of alien enemies, citizens of a foreign nation with which the United States is at war, is liable to seizure and confiscation, the exercise of such power resting in Congress; but if Congress does not act, the property of alien enemies should be protected.⁸⁶ How-

⁸⁵ *Du Hourmelin v. Sheldon*, 1 Beav. 79; s. c., 4 Myl. & Cr. 525; *Craig v. Leslie*, 3 Wheat. (U. S.) 563, 4 L. Ed. 460; *Compton v. McMahon*, 19 Mo. App. 494, 503; *Vandewalker v. Rollins*, 63 N. H. 460, 464, 3 Atl. 625; *Scudder's Exrs. v. Vanarsdale*, 13 N. J. Eq. 109, 113.

⁸⁶ 1 Kent Com. **59-65, and cases cited; 2 Kent. Com. *63; *Brown v. United States*, 8 Cranch (U. S.) 110, 3 L. Ed. 504; *Conrad v. Waples*, 96 U. S. 284, 24 L. Ed. 721; *Crutcher v. Hord*, 4 Bush (67 Ky.) 360; *McVeigh v. Bank of Old Dominion*, 26 Grat. (Va.) 188, 199. To the same effect, see *Bradwell v. Weeks*, 1 Johns. Ch. (N. Y.) 206, the opinion being by Chancellor Kent, and concurred in by all members of the Supreme Court. This decree, however, was reversed on appeal to the Court of Errors, the members of such court being equally divided in opinion, the deciding voice being the president of the court, Lieutenant Governor Taylor.

Compare: *Heirn v. Bridault*, 37 Miss. 209, 232. holding that in the

absence of law conferring the right, an African (who is classified as an alien enemy) could neither take nor hold property in that state, by deed or devise, by descent or purchase, except free persons of color residing there by permission.

The question of the rights of alien enemies is an interesting one at this time, but the subject is too extended to be dealt with here. It may be said that alien enemies, although they may be sued and are entitled to defend actions instituted against them, in the absence of a statutory grant of privilege, can not prosecute suits in the courts of this country while war continues; the cause of action, however, is merely held in suspense during hostilities, and may thereafter be prosecuted.—*Knoefel v. Williams*, 30 Ind. 1; *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639; *Crutcher v. Hord*, 4 Bush (67 Ky.) 360; *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617; *Levine v. Taylor*, 12 Mass. 8; *Bell v. Chapman*, 10 Johns. (N. Y.)

ever, since aliens can take real property by devise, although their title will be defeasible, alien enemies, in the absence of legislation to the contrary, can hold the title to realty taken by devise until office found or seizure and confiscation.⁸⁷ And since they can take personal property by bequest or by reason of kinship, and can transmit the same, bequests of personalty to alien enemies are valid; but since they have not the right to sue, the right to the property may be said to be in abeyance and unenforceable until after the war has ceased.⁸⁸

§ 324. The Same Subject: Effect of Treaties.

The rights of aliens are often regulated by treaty. Wherever a treaty is in force between the United States and a foreign government, it supersedes all constitutions and laws of the various states which may be in conflict with it, and is the supreme law of the land, needing no legislation to make it operative or effective.⁸⁹ Where

183; *Jackson v. Decker*, 11 Johns. (N. Y.) 418; *Sanderson v. Morgan*, 39 N. Y. 231; *Bishop v. Jones*, 28 Tex. 294.

⁸⁷ *Fairfax v. Hunter*, 7 Cranch (U. S.) 603, 3 L. Ed. 453; *Jackson v. Clarke*, 3 Wheat. (U. S.) 2, 4 L. Ed. 319; *United States v. Repentigny*, 5 Wall. (U. S.) 211, 268, 18 L. Ed. 627; *Taylor v. Benham*, 5 How. (U. S.) 233, 270, 12 L. Ed. 130; *Kershaw v. Kelsey*, 100 Mass. 561, 575, 97 Am. Dec. 124, 1 Am. Rep. 142; *Yeo v. Mercereau*, 18 N. J. Law 387, 397; *Hardy v. De Leon*, 5 Tex. 211, 239; *Marshall v. Conrad*, 5 Call (Va.) 364; *Stephen's Heirs v. Swann*, 9 Leigh (Va.) 404.

Compare: *Crane v. Reeder*, 21 Mich. 24, 80, 4 Am. Rep. 430.

⁸⁸ *Attorney General v. Wheedon*, Park. (Eng. Ex.) 267; *Crutcher v. Hord*, 4 Bush (67 Ky.) 360.

Contra: *Bradwell v. Weeks*, 13 Johns. (N. Y.) 1, by a divided court.

⁸⁹ *Fellows v. Blacksmith*, 19 How. (U. S.) 366, 372, 15 L. Ed. 684; *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1, 44, 8 L. Ed. 25; *Worcester v. Georgia*, 6 Pet. (U. S.) 515, 8 L. Ed. 483; *The Kansas Indians*, 5 Wall. (U. S.) 737, 18 L. Ed. 667; *Hauenstein v. Lynham*, 100 U. S. 483, 489, 25 L. Ed. 628; *Head Money Cases*, 112 U. S. 580, 599, 28 L. Ed. 798,

rights are conferred upon aliens by treaty, they may be enforced in the courts of the various states or of the

5 Sup. Ct. 247; *Baldwin v. Franks*, 120 U. S. 678, 703, 30 L. Ed. 766, 7 Sup. Ct. 656, 763; *Whitney v. Robertson*, 124 U. S. 190, 194, 31 L. Ed. 386, 8 Sup. Ct. 456; *Geofroy v. Riggs*, 133 U. S. 258, 33 L. Ed. 642, 10 Sup. Ct. 295; *Blythe v. Hinckley*, 180 U. S. 333, 45 L. Ed. 557, 21 Sup. Ct. 390; *Blythe v. Hinckley*, 127 Cal. 431, 59 Pac. 787; *Scharpf v. Schmidt*, 172 Ill. 255, 50 N. E. 182; *Wilcke v. Wilcke*, 102 Iowa 173, 71 N. W. 201.

As to the Convention of 1853, between France and the United States, see: *Geofroy v. Riggs*, 133 U. S. 258, 33 L. Ed. 642, 10 Sup. Ct. 295.

As to former treaties with France, see: *Chirac v. Chirac*, 2 Wheat. (U. S.) 259, 4 L. Ed. 234; *Carneal v. Banks*, 10 Wheat. (U. S.) 181, 6 L. Ed. 297.

As to the treaty ceding Louisiana to the United States, see: *Delassus v. United States*, 9 Pet. (U. S.) 117, 133, 9 L. Ed. 71.

As to the treaty of 1783 between Great Britain and the United States, see: *Orr v. Hodgson*, 4 Wheat. (U. S.) 453, 4 L. Ed. 613; *Society v. New Haven*, 8 Wheat. (U. S.) 464, 5 L. Ed. 662; *Shanks v. Dupont*, 3 Pet. (U. S.) 242, 7 L. Ed. 666.

As to the treaty of 1794 be-

tween Great Britain and the United States, see: *Fairfax v. Hunter*, 7 Cranch (U. S.) 603, 3 L. Ed. 453; *Jackson v. Clarke*, 3 Wheat. (U. S.) 1, 12, 4 L. Ed. 319; *Craig v. Radford*, 3 Wheat. (U. S.) 594, 4 L. Ed. 467; *Orr v. Hodgson*, 4 Wheat. (U. S.) 453, 4 L. Ed. 613.

As to the treaty of 1850 between Switzerland and the United States, see: *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628.

As to the treaty with Austria, see: *Baltz Brewing Co. v. Kaiserbrauerei, Beck & Co.*, 74 Fed. 222, 20 C. C. A. 402.

As to treaty with the German Empire, see: *The Elwine Kreplin*, 9 Blatchf. (U. S.) 438, Fed. Cas. No. 4426; *People v. Gerke*, 5 Cal. 381; *Stamm v. Bostwick*, 40 Hun (N. Y.) 35; s. c., 122 N. Y. 48, 9 L. R. A. 597, 25 N. E. 233; *Scharpf v. Schmidt*, 172 Ill. 255, 50 N. E. 182; *Opel v. Shoup*, 100 Iowa 407, 37 L. R. A. 583, 69 N. W. 560.

As to treaty with Russia, see: *Maynard v. Maynard*, 36 Hun (N. Y.) 227.

As to treaty with Belgium, see: *Wildenhaus' Case*, 120 U. S. 1, 30 L. Ed. 565, 7 Sup. Ct. 385.

As to treaty with Italy, see: *Storti v. Massachusetts*, 183 U. S. 138, 46 L. Ed. 121, 22 Sup. Ct. 72.

United States the same as if such rights were derived from a legislative enactment.⁹⁰

§ 325. The Same Subject: State Regulations.

Each of these United States has the power, either by its constitution or by legislative enactment, to confer upon aliens the right to take or to pass property by devise or descent; it may limit or deny such right except where such action would be in conflict with some treaty.⁹¹ In a number of the states the rule of the common law has been modified and even abolished by statutes which have conferred upon aliens, other than corporations, the same property rights as are possessed by citizens, including the right to take and transmit real property by descent or devise. This liberal policy has not been adopted in all jurisdictions, in some of the states the rule of the common law still prevailing.⁹² As to the District of

⁹⁰ *Choteau v. Marguerite*, 12 Pet. (U. S.) 507, 9 L. Ed. 1174; *Dainese v. Hale*, 91 U. S. 13, 23 L. Ed. 190; *Head Money Cases*, 112 U. S. 580, 28 L. Ed. 798, 5 Sup. Ct. 247; *United States v. Rauscher*, 119 U. S. 407, 30 L. Ed. 425, 7 Sup. Ct. 234; *In re Cooper*, 143 U. S. 472, 36 L. Ed. 232, 12 Sup. Ct. 453.

⁹¹ *Chirac v. Chirac*, 2 Wheat. (U. S.) 259, 272, 4 L. Ed. 234; *Levy v. M'Cartee*, 6 Pet. (U. S.) 102, 8 L. Ed. 334; *DeVaughn v. Hutchinson*, 165 U. S. 566, 41 L. Ed. 827, 17 Sup. Ct. 461; *Clarke v. Clarke*, 178 U. S. 186, 44 L. Ed. 1028, 20 Sup. Ct. 873; *Blythe v. Hinckley*, 180 U. S. 333, 45 L. Ed. 557, 21 Sup. Ct. 390; *State v. Rogers*, 13 Cal. 159; *Billings v.*

Hauver, 65 Cal. 593, 4 Pac. 639; *State v. Smith*, 70 Cal. 153, 12 Pac. 121.

⁹² A reference to all the various statutes would serve no useful purpose in this work; the law controlling must in each case be specially investigated. But as a matter for general reference, a few cases are cited which have construed some of the statutes with reference to the rights of aliens: *Griffith v. Godey*, 113 U. S. 89, 96, 28 L. Ed. 934, 5 Sup. Ct. 383, referring to the Constitution of California; *Blythe v. Hinckley*, 180 U. S. 333, 45 L. Ed. 557, 21 Sup. Ct. 390, referring to laws of California; *McConville v. Howell*, 17 Fed. 104, 5 McCrary 319, refer-

Columbia and the territories, they are governed by acts of Congress.⁹³

ring to laws of Colorado; *Bahaud v. Bize*, 105 Fed. 485, referring to laws of Nebraska; *Nicrosi v. Phillipi*, 91 Ala. 299, 8 So. 561; *Jones v. Minogue*, 29 Ark. 637; *Ferguson v. Neville*, 61 Cal. 356; *In re Leopold's Estate*, 67 Cal. 385, 7 Pac. 766; *Blythe v. Hinckley*, 127 Cal. 431, 59 Pac. 787; *Matter of Pendergast's Estate*, 143 Cal. 135, 76 Pac. 962; *State v. Stevenson*, 6 Idaho 367, 55 Pac. 886; *Beavan v. Went*, 155 Ill. 592, 31 L. R. A. 85, 41 N. E. 91; *De Graff v. Went*, 164 Ill. 485, 45 N. E. 1075; *Meadowcroft v. Winnebago County*, 181 Ill. 504, 54 N. E. 949; *State v. Witz*, 87 Ind. 190; *Donaldson v. State*, (Ind.) 67 N. E. 1029; *Opel v. Shoup*, 100 Iowa 407, 37 L. R. A. 583, 69 N. W. 560; *Doehrel v. Hillmer*, 102 Iowa 169, 71 N. W. 204; *Meier v. Lee*, 106 Iowa 303, 76 N. W. 712; *Eustache v. Rodaquest*, 11 Bush (74 Ky.) 42; *Commonwealth v. Newcomb*, 109 Ky. 18, 58 S. W. 445; *Rabasse's Succession*, 49 La. Ann. 1405, 22 So. 767; *Lumb v. Jenkins*, 100 Mass. 527; *Burke v. Adams*, 80 Mo. 504, 50 Am. Rep. 510; *Utassy v. Giedinghagen*, 132 Mo. 53, 33 S. W. 444; *Pembroke v. Huston*, 180 Mo. 627, 79 S. W. 470; *Territory v. Lee*, 2 Mont. 124, holding that the organic act of the Territory of Montana does not accept the common law rule.

But see: Civil Code of Montana,

§ 1867; *Glynn v. Glynn*, 62 Neb. 872, 87 N. W. 1052; *Dougherty v. Kubat*, 67 Neb. 269, 93 N. W. 317; *State v. Preble*, 18 Nev. 251, 2 Pac. 754; *Richardson v. Amsdon*, 85 N. Y. Supp. 342; *Fay v. Taylor*, 31 Misc. Rep. 32, 63 N. Y. Supp. 572; *Haley v. Sheridan*, 107 App. Div. 17, 94 N. Y. Supp. 864; *McGillis v. McGillis*, 154 N. Y. 532, 49 N. E. 145; *Spencer v. Carlson*, 36 Ore. 364, 59 Pac. 708; *Commonwealth v. Detwiller*, 131 Pa. St. 614, 7 L. R. A. 357, 18 Atl. 990; *Ehrlich v. Weber*, 114 Tenn. 711, 88 S. W. 188; *Hanrick v. Gurley*, (Tex. Civ.) 48 S. W. 994; *Hannon v. Hounihan*, 85 Va. 429, 12 S. E. 157; *State v. Morrison*, 18 Wash. 664, 52 Pac. 228; *State v. Superior Court*, 33 Wash. 542, 74 Pac. 686.

Where the statute which allows aliens to hold lands prescribes certain conditions in order that the power may be exercised, non-compliance with the conditions will cause the property to escheat to the state.—*Estate of Pendergast*, 143 Cal. 135, 76 Pac. 962; *Wuester v. Folin*, 60 Kan. 334, 56 Pac. 490.

⁹³ *Geofroy v. Riggs*, 133 U. S. 258, 33 L. Ed. 642, 10 Sup. Ct. 295; 24 U. S. Stats. L. 476; *Johnson v. Elkins*, 1 App. Cas. (D. C.) 430.

INDIANS.

Indians are under the protection of the federal government,

as wards of the nation. They owe no allegiance to the various states.—*United States v. Kagama*, 118 U. S. 375, 383, 30 L. Ed. 228; *United States v. Thomas*, 151 U. S. 577, 38 L. Ed. 276; *Stephens v. Cherokee Nation*, 174 U. S. 445, 484, 43 L. Ed. 1041; *Matter of Heff*, 197 U. S. 488, 499, 49 L. Ed. 848.

The power of self government has been conferred on many of the Indian nations by treaties.—*Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1, 8 L. Ed. 25; *Worcester v. Georgia*, 6 Pet. (U. S.) 515, 519, 8 L. Ed. 483; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 654, 34 L. Ed. 295; *Delaware Indians v. Cherokee Indians*, 193 U. S. 127, 144, 48 L. Ed. 640.

Where a tribal organization is recognized by the United States, members of such tribe inherit property according to the laws, usages and customs of such tribe, not under the laws of the state wherein the tribe is located.—*Mackey v. Cox*, 18 How. (U. S.) 100, 15 L. Ed. 299; *Jones v. Meehan*, 175 U. S. 1, 44 L. Ed. 49.

As to lands allotted to Indians, Congress has passed several statutes for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, and for other purposes. Wills of Indians devising allotted lands have been required to be approved, as, for instance, the Act of Congress of

April 26, 1906, ch. 1876, 34 Stat. L. 137, § 23 thereof, provides that the devisees of Indians of the Five Civilized Tribes in the Indian Territory must be approved by a judge of the United States Court for the Indian Territory, or a United States commissioner or judge of a county court of the State of Oklahoma, in those cases where an Indian, being of full blood, disinherits his wife, parent, child or children, otherwise he may make a will if of sound mind. The Act of Congress of June 25, 1910, ch. 431, 36 Stat. L. 855, by § 2 provides that any Indian of the age of twenty-one years, to whom an allotment has been or thereafter may be made, shall have the right, prior to the expiration of the trust period and before the issuance of a fee simple patent, to dispose of such allotment by will, in accordance with rules and regulations to be prescribed by the Secretary of the Interior; provided, however, that no will so executed shall be valid until it shall have been approved by the Commissioner of Indian Affairs and the Secretary of the Interior. See, also, amendment to the above section by act of February 14, 1913, ch. 55, 37 Stat. L. 678. This act, however, did not include the Five Civilized Tribes, the Osage Indians, or apply to the State of Oklahoma. See, also, *Hallowell v. Commons*, 239 U. S. 506, 60 L. Ed. 409.

The provisions of the Act of Congress of April 26, 1906, 34 Stat. L. 137, providing for acknowledgment and approval by a judge of an Indian's will disinheriting children, does not apply to grandchildren or great grandchildren.—*Bell v. Davis*, (Okla.) 155 Pac. 1132.

The Revised Laws of Oklahoma, 1910, § 8341, do not apply to Indians of the Five Civilized Tribes, Indians of those tribes being permitted by Congress to dispose of their allotted land by will.—*Brock v. Keifer*, (Okla.) 157 Pac. 88.

A member of the Omaha tribe of Indians, to whom land has been allotted, may devise his interest in the land, by will, and such devise is valid, although the approval required by the act takes place after the death of the testator.—*Moore v. Busse*, 98 Neb. 813, 154 N. W. 552.

The will of an Indian is valid if executed according to the law in force at the time of death, although invalid under the law in force at the time of its execution.—*Barber v. Brown*, (Okla.) 154 Pac. 1156.

CHAPTER XIV.

MENTAL CAPACITY NECESSARY TO MAKE A VALID WILL.

- § 326. A testator must be of sound mind.
- § 327. Mental capacity is tested as of the date of the execution of the will.
- § 328. Testamentary capacity refers to the ability to understand.
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- § 337. Lucid intervals.
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- § 344. Insane delusions defined.
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- § 347. Effect of evidence of eccentricities.
- § 348. Deafness, dumbness, and blindness.
- § 349. The same subject.
- § 350. Excessive use of drugs or intoxicants.
- § 351. Apoplectic seizures and epileptic spells.
- § 352. Suicide does not, of itself, establish mental incompetency.
- § 353. Unreasonable prejudices and animosities.
- § 354. Wills containing harsh and unreasonable provisions: Do
not establish incapacity.
- § 355. The same subject: How considered.

§ 326. A Testator Must Be of Sound Mind.

The Statute of Wills of Henry VIII¹ authorizing testamentary dispositions of real property, excluded idiots and those of non-sane memory, and in this regard no change was made by the statute of 1 Victoria.² Such always has been and now is the general rule. A testator must be of sound mind at the time he makes his will, otherwise it may be declared invalid. A sound mind is a disposing mind.³ If the mental faculties are totally extinguished; the testator can not be said to possess understanding to any degree whatsoever, or for any purpose. But the degrees of mental capacity are countless; we may easily distinguish the extremes, the wise man from the idiot; but there is a twilight zone of human intelligence, the boundary between light and darkness. Thousands of adjudicated cases furnish us the law, but in the final analysis each rests on its own particular facts.⁴

¹ Statute of 32 Henry VIII, ch. 1, as explained by the Statute of 34 and 35 Henry VIII, ch. 5.

² Statute of 1 Victoria, ch. 26.

³ *Allen v. North*, 271 Ill. 190, 110 N. E. 1027.

⁴ "But if a man be of a mean understanding (neither of the wise sort nor of the foolish), but indifferent, as it were, 'twixt a wise man and a fool, yea, though he rather inclined to the foolish

§ 327. Mental Capacity Is Tested as of the Date of the Execution of the Will.

The mental capacity of a testator is tested as of the date of the execution of his will.⁵ Other things being equal, the evidence of attesting witnesses, and next to them, of those present at the execution, is most relied

sort, so that for his dull capacity he might worthily be termed *gros-sum caput*, a dull pate or a dunce, such an one is not prohibited to make a testament unless he be held more foolish, and so very simple and sottish, that he may easily be made to believe things incredible or impossible, as that he can fly, or that in old time trees did walk, beasts and birds could speak, as it is in Aesop's Fables; for he that is so foolish can not make a testament, because he hath not so much wit as a child of ten or eleven years old, who is therefore intestable, namely, for want of judgment."—Swinburne Wills, pt. 2, § 4.

See, also, *Osmond v. Fitzroy*, 3 P. Wms. 129; *Willis v. Jernegan*, 2 Atk. 251; *Townsend v. Lowfield*, 1 Ves. Sen. 35.

Lord Cranworth, in *Boyse v. Rossborough*, 6 H. L. Cas. 1, says: "There is no difficulty in the case of a raving madman or a driveling idiot in saying that he is not a person capable of disposing of property, but between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every stage of intellect, every degree of

mental capacity. There is no possibility of mistaking midnight from noon, but at what precise moment twilight becomes darkness is hard to determine."

It is not every degree of insanity which will vitiate a will. There is no standard, so although the testator be enfeebled, both physically and mentally, yet if he retains sufficient mind, reason and judgment, at the time he executes the will to understand that he is engaged in that kind of business, that he has knowledge of his property and how he wishes to dispose of it, and remembers those who have actual claims upon his bounty, he is of testamentary capacity. —*Stevens v. Myers*, 62 Or. 372, 121 Pac. 434, 126 Pac. 29.

⁵ *Huyck v. Rennie*, 151 Cal. 411, 90 Pac. 929; *Wisner v. Chandler*, 95 Kan. 36, 147 Pac. 849; *Harris v. Hipsley*, 122 Md. 418, 89 Atl. 852; *In re Buckman's Will*, 80 N. J. Eq. 556, 85 Atl. 246; *Chrisman v. Chrisman*, 16 Or. 127, 18 Pac. 6; *In re Pickett's Will*, 49 Or. 127, 89 Pac. 377; *In re McNitt's Estate*, 229 Pa. St. 71, 78 Atl. 32; *Warren v. Ellis*, (Tex. Civ.) 137 S. W. 1182; *Points v. Nier*, 91 Wash. 20, 157 Pac. 44.

upon.⁶ Evidence as to the testator's mental condition at times more or less remote from the date of the execution of the will, however, is admissible, but the court may properly require the party offering such evidence to specify the time to which he relates in order that its weight may be intelligently estimated.⁷

§ 328. Testamentary Capacity Refers to the Ability to Understand.

In order that a will may be valid, something more is required than the mere signing by the maker. It is easy to say that a testator, otherwise qualified and not subjected to fraud, duress or undue influence, must be of sound mind when he makes his will, but the condition of the human mind is most difficult of proof. Mental unsoundness is so varied in character and manifestation that even the most experienced alienists, after careful study and investigation, find it difficult either to state its cause or to define its effect upon the actions of the one alleged to be afflicted; and such experts quite frequently disagree. It is impossible to state the degree of intelligence necessary to make a valid will, since it is a varying quantity, depending on the facts to be considered. It is difficult to lay down a general rule; expressions of such

⁶ *Chrisman v. Chrisman*, 16 Or. 127, 18 Pac. 6; *In re Pickett's Will*, 49 Or. 127, 89 Pac. 377.

⁷ *Huyck v. Rennie*, 151 Cal. 411, 90 Pac. 929.

The time when a contested will was executed is always the time of primary importance in estimating the testator's capacity. Evidence of capacity or want of capacity before or after merely aids

the investigation of the subject of testamentary capacity at the time the will was executed.—*Wisner v. Chandler*, 95 Kan. 36, 147 Pac. 849; *Kerr v. Lunsford*, 31 W. Va. 659, 2 L. R. A. 668, 8 S. E. 493.

See, post, §§ 355, 356, 357, as to evidence of testamentary capacity before or after the will was made.

a rule are found in many adjudicated cases, but often have reference to the particular facts under consideration. A testator, in order to execute a valid will, must be of sound mind with reference to whatever is involved in the transaction, and that varies according to the extent and value of the property and the character of the dispositions. It is sometimes said that the testator must understand the nature and the importance of the business which he is transacting.⁸ But testamentary capacity deals with the ability to understand, not with the question of actual knowledge. It is the capacity to know and understand which the law regards, not that the testator actually knew, as matters of fact, the nature, extent and value of his property.⁹ Such cases must not be confused with those involving questions of fraud and intent. A wise man may execute an instrument, but it is not his will unless he knew its character, since the signing might be through fraud or mistake, and unless he intended it as a testamentary disposition, since the execution might have been in jest. In such cases the question of the testamentary capacity of the testator would not be involved.

§ 329. Sound Mind Defined: Variations of the Rule.

A sound mind may be said to exist where the testator has, at the time of making his will, the mental ability to understand and comprehend the nature of the act, the

⁸ *Roche v. Nason*, 105 App. Div. 256, 93 N. Y. Supp. 565; *Points v. Nier*, 91 Wash. 20, 157 Pac. 44.

⁹ "Actual comprehension of the nature and extent of one's property is not an essential element of testamentary capacity." The capacity to know is what the law

regards.—See, *Yoe v. McCord*, 74 Ill. 33; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948; *Reichenbach v. Ruddach*, 127 Pa. St. 564, 18 Atl. 432; *Holmes v. Campbell College*, 87 Kan. 597 Ann. Cas. 1914a, 475, 41 L. R. A. (N. S.) 1126, 125 Pac. 25.

value, condition and extent of his property, his relations to the persons about him, the number and names of those who are the natural objects of his bounty,¹⁰ and regarding such matters to form a rational judgment.¹¹ Some statements of the rule are to the effect that the testator must have the ability, *without prompting*, to comprehend the foregoing matters.¹² Suggestion which merely refreshes the memory should not vitiate a will, the intelligence to understand being present. If the prompting is of such a character as to amount to undue influence, the question of capacity would only be material as a matter of evidence in order to show, in a contest on the ground of undue influence, the effect of such prompting. There are statements of the rule which require mental ability sufficient to *review* all facts in relation with each other so as to form a judgment,¹³ while others omit the

10 A testator's perception of his relation to the persons who should be objects of his bounty does not mean that he should know and recognize every distant relative who is entitled to inherit from him under the existing canons of descent. The definition refers to near relations of a testator, those who are the "natural objects of his bounty." Cousins to the second, third, and fourth degree of propinquity are not included in the definition of "natural objects of testator's bounty."—*Matter of McCarty's Will*, 141 App. Div. 816, 126 N. Y. Supp. 699, 702; *In re Campbell's Will*, 136 N. Y. Supp. 1086, 1096-1097.

11 No distinction is made between the capacity requisite to

make a will of personalty and of realty.—*Winchester's Case*, 6 Coke 23; *Sloan v. Maxwell*, 3 N. J. Eq. 563, 566.

12 *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405; *Mason v. Bowen*, 122 Ark. 407, 183 S. W. 973; *Spratt v. Spratt*, 76 Mich. 384, 43 N. W. 627; *Schleiderer v. Gergen* (*In re Latto's Estate*), 129 Minn. 248, 152 N. W. 541; *In re Butler's Will*, 110 Wis. 70, 85 N. W. 678.

13 *Lehman v. Lindenmeyer*, 48 Colo. 305, 109 Pac. 956; *Spratt v. Spratt*, 76 Mich. 384, 43 N. W. 627; *Schleiderer v. Gergen* (*In re Latto's Estate*), 129 Minn. 248, 152 N. W. 541; *In re Butler's Will*, 110 Wis. 70, 85 N. W. 678.

requirement. Here we must remember that the adjudicated cases deal with facts; a decision may be correct although the rule be too strongly or too loosely stated. Ability to form a rational judgment regarding the matters involved should be demanded; but that the testator should be mentally competent to review all matters and their inter-relationship, and to compare or contrast the same, seems too great a requirement. The motives which actuate a testator are indeterminable and are known only to himself; testamentary wishes do not generally spring from a cold analysis, and the law should not require that which, even with the will of the wise man, can not be said to exist.¹⁴

¹⁴ The following cases lay down the general rule, with variations, as to the degree of mental capacity required to make a valid will: *Marsh v. Tyrrell*, 2 Hagg. Ecc. 84, 122; *Blewitt v. Blewitt*, 4 Hagg. Ecc. 410, 419; *Winchester's Case*, 6 Coke 23; *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *Brown v. Bruce*, 19 U. C. Q. B. 35; *Council v. Mayhew*, 172 Ala. 295, 55 So. 314; *In re Huston's Estate*, 163 Cal. 166, 124 Pac. 852; *In re De Laveaga's Estate*, 165 Cal. 607, 133 Pac. 307; *Lehman v. Lindenmeyer*, 48 Colo. 305, 109 Pac. 956; *Dunham's Appeal*, 27 Conn. 192; *Hall v. Hall*, 18 Ga. 40; *McFarland v. Morrison*, 144 Ga. 63, 86 S. E. 227; *Delaney v. Salina*, 34 Kan. 532, 9 Pac. 271; *McCoy v. Sheehy*, 252 Ill. 509, 96 N. E. 1069; *In re Weedman's Estate*, 254 Ill. 504, 98 N. E. 956; *Austin v. Austin*, 260 Ill. 299, Ann. Cas. 1914D, 336, 103 N. E. 268;

Coleman v. Marshall, 263 Ill. 330, 104 N. E. 1042; *Bowers v. Evans*, 269 Ill. 453, 109 N. E. 989; *Cline v. Lindsey*, 110 Ind. 337, 11 N. E. 441; *Crawfordsville Trust Co. v. Ramsey*, 178 Ind. 258, 98 N. E. 177; *Pence v. Myers*, 180 Ind. 282, 101 N. E. 716; *Wiley v. Gordon*, 181 Ind. 252, 104 N. E. 500; *Sevening v. Smith*, 153 Iowa 639, 133 N. W. 1081; *Bales v. Bales*, 164 Iowa 257, 145 N. W. 673; *Philpott v. Jones*, 164 Iowa 730, 146 N. W. 859; *Shropshire v. Reno*, 5 J. J. Marsh (28 Ky.) 91; *Whitney v. Twombly*, 136 Mass. 145; *Lyon v. Townsend*, 124 Md. 163, 91 Atl. 704; *Brown v. Fidelity Trust Co.*, 126 Md. 175, 94 Atl. 523; *Spratt v. Spratt*, 76 Mich. 384, 43 N. W. 627; *In re Nelson's Will*, (Stockton v. Thorn) 39 Minn. 204, 39 N. W. 143; *Hammond v. Dike*, 42 Minn. 273, 274, 18 Am. St. Rep. 503, 44 N. W. 61; *Mitchell v. Mitchell*, 43

§ 330. The Degree of Testamentary Capacity Required Varies According to Conditions.

It has been variously said that less capacity is required to make a valid will than is required to execute any other

Minn. 73, 44 N. W. 885; Schleiderer v. Gergen, (In re Latto's Estate) 129 Minn. 248, 152 N. W. 541; Lewis v. Murray (In re Hudson's Estate), 131 Minn. 439, 155 N. W. 392; Berst v. Moxom, 157 Mo. App. 342, 138 S. W. 74; Luebert v. Brockmeyer, 158 Mo. App. 196, 138 S. W. 92; Wolfe v. Whitworth, 170 Mo. App. 372, 156 S. W. 715; Crum v. Crum, 231 Mo. 626, 132 S. W. 1070; Turner v. Anderson, 236 Mo. 523, 139 S. W. 180; Current v. Current, 244 Mo. 429, 148 S. W. 860; Naylor v. McRuer, 248 Mo. 423, 154 S. W. 772; Andrew v. Linebaugh, 260 Mo. 623, 169 S. W. 135; Byrne v. Fulkerson, 254 Mo. 97, 162 S. W. 171; Murphy v. Nett, 47 Mont. 38, 130 Pac. 451; In re Dillon's Will, 82 N. J. Eq. 222, 87 Atl. 161; In re Craft's Estate, 85 N. J. Eq. 125; 94 Atl. 606; Brown v. Torrey, 24 Barb. (N. Y.) 583; In re Campbell's Will, 136 N. Y. Supp. 1086; In re Browning's Will, 80 Misc. Rep. 619, 142 N. Y. Supp. 683; Phillips v. Flagler, 82 Misc. Rep. 500, 143 N. Y. Supp. 798; In re Carpenter's Will, 145 N. Y. Supp. 365; In re McCusker's Will, 89 Misc. Rep. 652, 153 N. Y. Supp. 1086; Horne v. Horne, 31 N. C. 99; Cornelius v. Cornelius, 52 N. C. 593; Barnhardt v. Smith, 86 N. C. 473; Bost

v. Bost, 87 N. C. 477; Cameron-Barkley Co. v. Thornton Light & Power Co., 138 N. C. 365, 50 S. E. 695, 107 Am. St. Rep. 532; Sprinkle v. Wellborn, 140 N. C. 163, 181, 111 Am. St. Rep. 827, 3 L. R. A. (N. S.) 174, 52 S. E. 666; In re Craven's Will, 169 N. C. 561, 86 S. E. 587; Wadsworth v. Purdy, 31 Ohio Civ. Ct. Rep. 110; Hubbard v. Hubbard, 7 Or. 42; In re Hart's Will, 65 Or. 263, 132 Pac. 526; In re Diggin's Estate, 76 Or. 341, 149 Pac. 73; Boyd v. Eby, 8 Watts (Pa.) 66, 70; McTaggart v. Thompson, 14 Pa. St. 149; In re Lindsay's Estate, 240 Pa. St. 19, 87 Atl. 302; In re Corson's Estate, 29 S. D. 14, 135 N. W. 666; Salinas v. Garcia, (Tex. Civ. App.) 135 S. W. 588; In re Bartels' Estate, (Tex. Civ. App.) 164 S. W. 859; Huff v. Welch, 115 Va. 74, 78 S. E. 573; Wilson v. Craig, 86 Wash. 465; Ann. Cas. 1917B, 871, 150 Pac. 1170; Freeman v. Freeman, 71 W. Va. 303, 76 S. E. 657; In re Butler's Will, 110 Wis. 70, 85 N. W. 678.

The term *compos mentis* as it relates to testamentary capacity, is carefully considered in Meeker v. Meeker, 75 Ill. 260; Bundy v. McKnight, 48 Ind. 502; Delafield v. Parish, 25 N. Y. 9; Van Guysling v. Van Kuren, 35 N. Y. 70; Tyler v. Gardiner, 35 N. Y. 559;

legal instrument,¹⁵ that no greater mental capacity is required to make a valid will than to make a valid deed,¹⁶ or that less mental capacity is required to make a will than to make a contract with those who deal with the party at arm's length.¹⁷ Comparisons of such nature are most difficult since it requires us to distinguish between two unknown quantities which are subject to infinite variations. A man may purchase a pound of coffee from his grocer; that is a business dealing, yet it could not be compared to a transaction covering the sale of extensive properties involving millions of dollars. A man may have but little property, its extent being so limited and its value so small that the entire situation may be easily understood by one of but slight intelligence. He may make his will and leave everything to his wife or children. Such a transaction could not be compared to one requiring the testamentary disposition of an estate of great

Kinne v. Johnson, 60 Barb. (N. Y.) 69.

Compare: Duffield v. Robeson, 2 Har. (Del.) 375, 379; Sutton v. Sutton, 5 Har. (Del.) 459; Townsend v. Bogart, 5 Redf. Sur. (N. Y.) 93, 105.

¹⁵ Matter of Halbert's Will, 15 Misc. Rep. 308, 37 N. Y. Supp. 757; Matter of Seagrist's Will, 1 App. Div. 615, 37 N. Y. Supp. 496; Matter of Armstrong's Will, 55 Misc. Rep. 487, 106 N. Y. Supp. 671; Matter of Browning's Will, 80 Misc. Rep. 619, 142 N. Y. Supp. 683; In re Carpenter's Will, 145 N. Y. Supp. 365, 370.

¹⁶ Allen v. North, 271 Ill. 190, 110 N. E. 1027; Stewart's Exr. v.

Lispenard, 26 Wend. (N. Y.) 255; Matter of Halbert's Will, 15 Misc. Rep. 308, 37 N. Y. Supp. 757; Matter of Sutherland's Will, 28 Misc. Rep. 424, 59 N. Y. Supp. 989; In re Carpenter's Will, 145 N. Y. Supp. 365, 371.

¹⁷ Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69, 27 L. R. A. (N. S.) 1; Greene v. Greene, 145 Ill. 264, 33 N. E. 941; Ring v. Lawless, 190 Ill. 520, 60 N. E. 881; People v. Baskin, 254 Ill. 509, 98 N. E. 957; Hammond v. Dike, 42 Minn. 273, 44 N. W. 61, 18 Am. St. Rep. 503; Schleiderer v. Gergen, (In re Latto's Estate) 129 Minn. 248, 152 N. W. 541.

value, of properties widely scattered, with devises and bequests in trust and to charities, and with many relations who might justly claim to be entitled to remembrance.¹⁸

§ 331. A Weak Mind Is Not Inconsistent With Testamentary Capacity.

It is not required that a testator be of perfect understanding in order that his will may have validity, nor will it be upheld merely because some understanding exists. A sound mind is a disposing mind; one who has the mental capacity to make a will is said to be of sound mind.¹⁹ This, however, does not comprehend a perfect mind, or one free from all infirmities. Soundness of mind, as used in the law of wills, means merely that intelligence necessary to make a valid testamentary disposition of property. Where a mind exists, it may be weak or strong, but the difference is only in the extent and power of its faculties. Testamentary capacity may exist in either case. It has been said that the test of a perfect capacity is where the individual talks and discourses rationally and sensibly and is fully capable of any rational act requiring thought, judgment and reflection. But a sound mind is not determined by how well a man may talk or reason, the soundness of his judgment, or

¹⁸ *Coleman v. Marshall*, 263 Ill. 320, 104 N. E. 1042; *Murphy v. Nett*, 47 Mont. 38, 130 Pac. 451.

It requires somewhat greater capacity to dispose of a large and diversified estate among numerous recipients with various gradations of claims, than it does to dispose of a small and simple estate among the members of one's own

immediate family.—*Trish v. Newell*, 62 Ill. 196, 14 Am. Rep. 79; *Schleiderer v. Gergen* (In re *Latto's Estate*) 129 Minn. 248, 152 N. W. 541; *Sheldon v. Dow*, 1 Demarest Sur. (N. Y.) 503; In re *Silverthorn*, 68 Wis. 372, 32 N. W. 287.

¹⁹ *Allen v. North*, 271 Ill. 190, 110 N. E. 1027.

the propriety of his actions. The question is not how well he may talk and act, but can he talk and act rationally and sensibly, has he mind and reason, has he thought, judgment and reflection? Incapacity is more than weak capacity. Mental weakness is not inconsistent with testamentary capacity, and mere feebleness of mind does not suffice to invalidate a will if the testator acted freely, and had sufficient mind to comprehend intelligently the nature and effect of the act he was performing, the estate he was undertaking to dispose of, and the relations he held to the various persons who might naturally expect to become the objects of his bounty.²⁰

20 *Rodney v. Burton*, 4 *Boyce* (27 Del.) 171, 86 Atl. 826; *Greene v. Greene*, 145 Ill. 264, 33 N. E. 941; *People v. Baskin*, 254 Ill. 509, 98 N. E. 957; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948; *Holmes v. Campbell College*, 87 Kan. 597, Ann. Cas. 1914A, 475, 41 L. R. A. (N. S.) 1126, 125 Pac. 25; *In re Craven's Will*, 169 N. C. 561, 86 S. E. 587; *Reichenbach v. Ruddach*, 127 Pa. St. 564, 18 Atl. 432.

In *Newhouse v. Godwin*, 17 Barb. (N. Y.) 236, the court says: "The weak have the same rights with the prudent or strong minded to dispose of their property."

Forgetfulness and slight delusions do not establish lack of capacity to make a will.—*In re Carpenter's Will*, 145 N. Y. Supp. 365, 372; *Children's Aid Society v. Loveridge*, 70 N. Y. 387.

The effect of mental disorders upon the capacity of the afflicted to make a will having so long

been the subject of the most careful judicial consideration, the rules on the subject must be regarded as settled. Thus it is that in courts of probate, though a man may have lapses of memory and show childishness at times, if he can manage his affairs prudently and correctly, show a due appreciation of the nature and amount of his property and of the claims of near and dear relations, his testamentary capacity is sufficient.—*Kinleside v. Harrison*, 2 Phillim. 449; *Haughian v. Conlan*, 86 App. Div. 290, 83 N. Y. Supp. 830; *In re Campbell's Will*, 136 N. Y. Supp. 1086, 1097; *Loder v. Whelpley*, 111 N. Y. 239, 250, 18 N. E. 874.

Impairment of memory of testator is generally not a ground for rejecting a will.—*Philpott v. Jones*, 164 Iowa 730, 146 N. W. 859; *Matter of McGraw's Will*, 9 App. Div. 372, 41 N. Y. Supp. 481; *Matter of Gihon's Will*, 44 App.

§ 332. Ability to Transact Business Not a True Test of Testamentary Capacity.

Minute and intelligent attention to business affairs is admissible on an issue of testamentary capacity.²¹ But a testator may have capacity to make a valid will, although not able to make contracts or manage his estate.²² He may not have sufficient mind and vigor of intellect to transact business generally, or to make and digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. The question is whether the testator's mind and memory are sufficiently sound to enable him to understand the business in which

Div. 621, 60 N. Y. Supp. 65; *Id.*, 163 N. Y. 595, 57 N. E. 1110; *In re Carpenter's Will*, 145 N. Y. Supp. 365, 371; *Horn v. Pullman*, 72 N. Y. 269.

²¹ *Billings Appeal*, 49 Conn. 456.

Compare: *Brewer v. Barrett*, 58 Md. 587.

Ability to transact ordinary business properly is strong evidence of testamentary capacity.—*Matter of Birdsall's Will*, 2 Con. Sur. 433, 13 N. Y. Supp. 421; *In re Carpenter's Will*, 145 N. Y. Supp. 365, 372.

The fact that a testator supervised his own large estate wisely, benevolently, and prudently until his death is evidence of the fact that he understood the condition of his property.—*In re Campbell's Will*, 136 N. Y. Supp. 1086, 1096.

One who is mentally capable of transacting business is ordinarily competent to make a will.—*Spier*

v. Spier (In re Spier's Estate), 99 Neb. 853, 157 N. W. 1014, L. R. A. 1916E, 692.

²² *Kramer v. Weinert*, 81 Ala. 414, 1 So. 26; *Greene v. Greene*, 145 Ill. 264, 33 N. E. 941; *People v. Baskin*, 254 Ill. 509, 98 N. E. 957; *Coleman v. Marshall*, 263 Ill. 330, 104 N. E. 1042; *Brinkman v. Rueggiesick*, 71 Mo. 553; *Clarke v. Sawyer*, 3 Sandf. Ch. (N. Y.) 351; *Matter of Seagrist's Will*, 1 App. Div. 615, 37 N. Y. Supp. 496; *Matter of Browning's Will*, 80 Misc. Rep. 619, 142 N. Y. Supp. 683; *In re Carpenter's Will*, 145 N. Y. Supp. 365, 371.

Mere grammatical errors of misuse of words which may be accounted for on the ground of mere inadvertence, do not show want of testamentary capacity.—*State v. Goodman*, 133 Tenn. 375, 181 S. W. 312.

he is engaged at the time he executes the will, to bear in mind the property to be bequeathed, to remember the objects of his bounty, and to plan a scheme of disposition.²³ Then again, business capacity may co-exist with insane delusions which would render the will invalid.²⁴ The business transactions of life may, and often do, involve considerations which do not arise in making a testamentary disposition of property. In the business world one must compete against many antagonists in order to protect his interests; it is a battle requiring

²³ *Harrison v. Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6141; *Stevens v. Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13412; *Comstock v. Hadlyme etc. Soc.*, 8 Conn. 254, 265, 20 Am. Dec. 100; *Kinne v. Kinne*, 9 Conn. 102, 105, 21 Am. Dec. 732; *Dunham's Appeal*, 27 Conn. 192, 204; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Hall v. Hall*, 18 Ga. 40; *Hathorn v. King*, 8 Mass. 371, 5 Am. Dec. 106; *Horne v. Horne*, 31 N. C. 99; *Lowe v. Williamson*, 2 N. J. Eq. 82, 85; *Sloan v. Maxwell*, 3 N. J. Eq. 563; *Andress v. Weller*, 3 N. J. Eq. 604; *Goble v. Grant*, 3 N. J. Eq. 629; *Brown v. Torrey*, 24 Barb. (N. Y.) 583; *Stewart's Exr. v. Lispenard*, 26 Wend. (N. Y.) 255; *Chandler v. Ferris*, 1 Har. (Del.) 454, 464; *Kachline v. Clark*, 4 Whart. (Pa.) 316, 320; *Boyd v. Eby*, 8 Watts (Pa.) 66; *Rambler v. Tryon*, 7 Serg. & R. (Pa.) 90, 95, 10 Am. Dec. 444; *Dornick v. Reichenback*, 10 Serg. & R. (Pa.) 84; *McMasters v. Blair*, 29 Pa. St. 298; *Kirkwood v. Gordon*, 7 Rich.

(S. C.) 474, 62 Am. Dec. 418; *Converse's Exr. v. Converse*, 21 Vt. 168, 52 Am. Dec. 58.

If a person have sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who would or should or might have been the objects of his bounty, and the scope or bearing of the provisions of his will, he has testamentary capacity.—*Kinne v. Johnson*, 60 Barb. (N. Y.) 69, 72, 73; *Watson v. Donnelly*, 28 Barb. (N. Y.) 653, 655; *Roche v. Nason*, 105 App. Div. 256, 93 N. Y. Supp. 565, affirmed 185 N. Y. 128, 77 N. E. 1007; *Matter of Johnson's Will*, 60 Misc. Rep. 277, 279, 113 N. Y. Supp. 283; *In re Campbell's Will*, 136 N. Y. Supp. 1086, 1096; *Delafield v. Parish*, 25 N. Y. 9, 109.

²⁴ *American Bible Society v. Price*, 115 Ill. 623, 5 N. E. 126; *Philpott v. Jones*, 164 Iowa 730, 146 N. W. 859.

See, post, §§ 344, 345, as to insane delusions.

experience, judgment and reasoning powers not necessary in making a will. Ability to conduct business, at the most, furnishes but an uncertain criterion of testamentary capacity, and is at best only one of the many questions of fact which may be taken into consideration.²⁵

§ 333. Presumption as to the Continuance of Insanity: Chronic or Temporary.

There is a general presumption that a thing once proved to exist, continues to exist as long as is usual for things of that nature. Therefore proof of insanity, permanent in its nature, raises the presumption of continuity; and a person who, prior to the time he executed his will, had been proved or adjudged incompetent because of insanity of a chronic character, is presumed to have been mentally incapacitated from executing his testament.²⁶ This presumption, however, does not obtain in

²⁵ *Coleman v. Marshall*, 263 Ill. 330, 104 N. E. 1042.

The conclusion of common sense is that it takes more mind to make some wills than to make some contracts, and vice versa; and there is excellent authority for the rule that, while contractual capacity implies *prima facie* the capacity to make a will, yet neither is a test for the other, and the presence or absence of one does not conclusively establish the presence or absence of the other.—*Murphy v. Nett*, 47 Mont. 38, 130 Pac. 451.

In *Craig v. Southard*, 148 Ill. 37, 35 N. E. 361, the court says: "The real question submitted to the jury, however, is not whether the

party had sufficient mental capacity to comprehend and transact ordinary business, but did he, at the time of making the instrument purporting to be his will, have such mind and memory as enabled him to understand the particular business in which he was then engaged."—*Harrison v. Rowan*, 3 Wash. C. C. 580 (Fed. Cas. No. 6141); *Stevens v. Van Cleve*, 4 Wash. C. C. 262 (Fed. Cas. No. 13412); *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167; *Greene v. Greene*, 145 Ill. 264, 33 N. E. 941.

See, also, *Coleman v. Marshall*, 263 Ill. 330, 104 N. E. 1042.

²⁶ *Swinburne Wills*, pt. 2, § 3; *Cartwright v. Cartwright*, 1 Phil.

those cases where the insanity was merely of a temporary character, being only intermittent or occasional, or the result of sickness or accident. Thus insanity existing some length of time before the making of the will, when shown to have been the temporary result of a violent sickness or accident, is not deemed to have impaired the present testamentary capacity.²⁷

lim. 90, 100; *Groom v. Thomas*, 2 Hagg. Ecc. 433, 434; *Attorney General v. Parnter*, 3 Bro. C. C. 443; *Chambers v. Proctor*, 2 Curt. 415; *Grimani v. Draper*, 6 Notes of Cas. 418; *Keely v. Moore*, 196 U. S. 38, 49 L. Ed. 376, 25 Sup. Ct. 169; *Eastis v. Montgomery*, 95 Ala. 486, 36 Am. St. Rep. 227, 11 So. 204; *In re Johnson's Estate*, 57 Cal. 529; *James White Memorial Home v. Haeg*, 204 Ill. 422, 68 N. E. 568; *In re Knox's Will*, 123 Iowa 24, 98 N. W. 468; *Gesell v. Baugher*, 100 Md. 677, 60 Atl. 481; *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545; *Woodville v. Morrill*, 130 Minn. 92, 153 N. W. 131; *Buford v. Gruber*, 223 Mo. 231, 253, 122 S. W. 717; *Byrne v. Fulkerson*, 254 Mo. 97, 162 S. W. 171; *In re Murphy's Estate*, 43 Mont. 353, Ann. Cas. 1912C, 380, 116 Pac. 1004; *Clark v. Fisher*, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; *Clarke v. Sawyer*, 3 Sandf. Ch. (N. Y.) 351; *Hoopes' Estate*, 174 Pa. St. 373, 34 Atl. 603; *In re Brown*, 39 Wash. 160, 109 Am. St. Rep. 868, 4 Ann. Cas. 488, 1 L. R. A. (N. S.) 540, 81 Pac. 552.

It has been held that this pre-

sumption continues notwithstanding the testator has been released on parole, there being no formal discharge from the asylum.—*Woodville v. Morrill*, 130 Minn. 92, 153 N. W. 131.

See, post, §§ 401, 402, as affecting burden of proof.

See, post, § 396, as to presumption of sanity.

²⁷ *Cartwright v. Cartwright*, 1 Phillim. 90, 100; *Murphree v. Senn*, 107 Ala. 424, 18 So. 264; *Trish v. Newell*, 62 Ill. 196, 201, 14 Am. Rep. 79; *Brown v. Riggins*, 94 Ill. 560; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Kirsher v. Kirsher*, 120 Iowa 337, 94 N. W. 846; *Halley v. Webster*, 21 Me. 461; *Townshend v. Townshend*, 7 Gill (Md.) 10; *Little v. Little*, 13 Gray (Mass.) 264; *Hix v. Whittemore*, 4 Metc. (Mass.) 545; *In re Murphy's Estate*, 43 Mont. 353, Ann. Cas. 1912C, 380, 116 Pac. 1004; *Koegel v. Egner*, 54 N. J. Eq. 623, 35 Atl. 394; *Clarke v. Sawyer*, 3 Sandf. Ch. (N. Y.) 351; *Matter of Davis' Will*, 91 Hun (N. Y.) 209, 36 N. Y. Supp. 344; *McMasters v. Blair*, 29 Pa. St. 298; *Barbey v. Boardman*, 202 Pa. St.

§ 334. Effect of an Adjudication of Insanity.

When the issue is the testamentary capacity of the testator, the question to be determined is whether or not the decedent was of sound mind at the time the will was executed; if he was, his mental condition, either before or after, will not affect the validity of the will.²⁸ It is well settled, however, that where a testator had been adjudged insane prior to the time he made his will, evidence of such fact may be admitted even though he were thereafter restored to capacity before his will was executed. It is well known that mental diseases often recur, and it is perfectly proper to show that one is predisposed to insanity.²⁹ But proof of prior adjudication of insanity is merely *prima facie* evidence of incompetency; it is not conclusive on the question of testamentary capacity since it may be shown either that the derangement of the mind of the testator was limited and not general and that he had sufficient mind to understand and appreciate his testamentary act, or that the will was executed during a

185, 51 Atl. 756; *Manley's Exr. v. Staples*, 65 Vt. 370, 26 Atl. 630.

See, post, §§ 350, 351.

²⁸ *Murphree v. Senn*, 107 Ala. 424, 18 So. 264; *People v. Francis*, 38 Cal. 183; *In re Nelson's Estate*, 132 Cal. 182, 64 Pac. 294; *In re Carithers' Estate*, 156 Cal. 422, 105 Pac. 127; *Voodry v. Trustees*, 251 Ill. 48, 95 N. E. 1034; *Bundy v. McKnight*, 48 Ind. 502; *Wisner v. Chandler*, 95 Kan. 36, 147 Pac. 849; *Turner v. Rusk*, 53 Md. 65; *McAllister v. Rowland* (*In re Bullard's Estate*), 124 Minn. 27, Ann. Cas. 1915B, 1006, 144 N. W. 412; *Balak v. Susanka*, 182 Mo. App.

458, 168 S. W. 650; *In re Murphy's Estate*, 43 Mont. 353, Ann. Cas. 1912C, 380, 116 Pac. 1004; *Clark's Heirs v. Ellis*, 9 Or. 128; *Surface v. Bentz*, 228 Pa. St. 610, 21 Ann. Cas. 215, 77 Atl. 922.

²⁹ *Mileham v. Montagne*, 148 Iowa 476, 125 N. W. 664.

To the same effect, see *Dicken v. Johnson*, 7 Ga. 484; *Terry v. Buffington*, 11 Ga. 337, 56 Am. Dec. 423; *Holliday v. Shepherd*, 269 Ill. 429, 109 N. E. 976; *Pepper v. Martin*, 175 Ind. 580, 92 N. E. 777; *In re Knox's Will*, 123 Iowa 24, 98 N. W. 468; *Rodgers v. Rodgers*, 50 Kan. 483, 43 Pac. 779.

lucid interval when he was of sound mind.³⁰ The weight of such evidence of a former adjudication of insanity depends upon the nature of the disease, whether temporary or chronic, whether the result of an injury from which complete recovery might be expected, whether the offspring of congenital defects, or whether it is of such a nature that its recurrence might be reasonably expected.³¹

§ 335. Effect of the Testator Being Under Guardianship.

It has been held that an adjudication of incompetency in guardianship proceedings, or the fact that the testator is under guardianship at the time he makes his will, does not raise even a *prima facie* presumption of testamentary incapacity.³² The issues in a proceeding for the appointment of a guardian do not necessarily involve the same questions which must be determined on an issue of testamentary capacity.³³ Other decisions hold that the fact that a person is under guardianship raises the presumption of incapacity to make a will, but that it does not, however, invalidate the testament if competency can be

³⁰ *Pepper v. Martin*, 175 Ind. 580, 92 N. E. 777; *Woodville v. Morrill*, 130 Minn. 92, 153 N. W. 131; *Lewis v. Jones*, 50 Barb. (N. Y.) 645; *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499; *Matter of Coe's Will*, 47 App. Div. 177, 62 N. Y. Supp. 376; *In re Schober's Will*, 90 Misc. Rep. 230, 154 N. Y. Supp. 309, 315; *Harnden v. Hays*, 9 Pa. 151; *Titlow v. Titlow*, 54 Pa. St. 216, 93 Am. Dec. 691.

³¹ *Mileham v. Montagne*, 148 Iowa 476, 125 N. W. 664.

³² *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545; *In re Cowdry's Will*, 77 Vt. 359, 3 Ann. Cas. 70; 60 Atl. 141.

Compare: *In re Wheelock's Will*, 76 Vt. 235, 56 Atl. 1013.

See, also, *Stone v. Damon*, 12 Mass. 488; *Breed v. Pratt*, 18 Pick. (Mass.) 115.

³³ *Pittard v. Foster*, 12 Ill. App. 132; *In re Ames' Will*, 40 Or. 495, 67 Pac. 737.

shown.³⁴ It is not all guardians who are appointed because of the mental incompetency of the ward. For instance, a minor may be under guardianship, but by reason of age, not because adjudged mentally deficient; and in spite of minority, in some jurisdictions he may make a will of personalty. A guardian may be appointed for other reasons which may not require an adjudication of mental incompetency. Even though one may be under guardianship because of inability to manage his property, yet lack of ability to transact business or to make contracts is not a true test of testamentary capacity, as a testator may not be able to properly and prudently manage his affairs, yet be able to make a valid will.³⁵ Proof of the guardianship in such a case should not be compared with one where the ward had been found to be afflicted with chronic insanity. It would seem the better rule that proof of a prior appointment of a guardian, the guardianship not having terminated when the ward made his will, should be admitted in evidence, to receive such consideration as the facts warrant. It should not establish testamentary incapacity, but its weight should de-

³⁴ See, generally, *In re Watts*, 1 Curt. 594; *Creagh v. Blood*, 2 Jones & L. 509; *Cooke v. Cholmondeley*, 2 Macn. & G. 22; *Prinsep v. Dyce Sombre*, 10 Moore P. C. C. 244; *Hall v. Warren*, 9 Ves. Jun. 605; *Snook v. Watts*, 11 Beav. 105; *Bannatyne v. Bannatyne*, 2 Robb. Ecc. 472, 16 Jur. 864; *Johnson's Estate*, 57 Cal. 529; *Lucas v. Parsons*, 27 Ga. 593; *Harrison v. Bishop*, 131 Ind. 161, 31 Am. St. Rep. 422, 30 N. E. 1069; *Matter of Fenton's Will*, 97 Iowa 192, 66 N. W. 99; *Crowninshield v.*

Crowninshield, 2 Gray (Mass.) 524; *Little v. Little*, 13 Gray (Mass.) 264; *Garnett v. Garnett*, 114 Mass. 379, 19 Am. Rep. 369; *In re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *Searles v. Harvey*, 6 Hun (N. Y.) 658; *Titlow v. Titlow*, 54 Pa. St. 216, 93 Am. Dec. 691; *In re Miller's Estate*, 179 Pa. St. 645, 39 L. R. A. 220, 36 Atl. 139; *In re Hoffman's Estate*, 209 Pa. St. 357, 58 Atl. 665.

³⁵ See, ante, § 332, as to the ability to transact business not being a true test.

pend upon the nature of the adjudication with reference to the character of the disability of the ward and its nearness or remoteness in time to the making of the will.³⁶

³⁶ The fact that a person was so far incompetent as to justify the appointment of a guardian, may not establish the want of capacity sufficient for the making of a will, and of course can not fix the status of the person affected as incompetent to make a will on a date prior to that of the adjudication. But it is certainly evidence proper to be considered on the issue of want of testamentary capacity at the time of the appointment of the guardian.—See, *In re Loveland's Estate*, 162 Cal. 595, 123 Pac. 801; *Terry v. Ruffington*, 11 Ga. 337, 56 Am. Dec. 423; *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545; *Chase v. Spencer*, 150 Mich. 99, 113 N. W. 578; *In re Ames' Will*, 40 Or. 495, 67 Pac. 737; *Schindler v. Parzoo*, 52 Or. 452, 97 Pac. 755; *Small v. Champeny*, 102 Wis. 61, 78 N. W. 407.

Where there is testimony tending to show that the mental condition of the person has not changed between the date of the act in question and the appointment of a guardian, the appointment, although later in time, is admissible on the issue of capacity when the act was done.—See, *In re Loveland's Estate*, 162 Cal. 595, 123 Pac. 801; *Schindler v. Parzoo*, 52 Or. 452, 97 Pac. 755;

Giles v. Hodge, 74 Wis. 360, 43 N. W. 163; *Deleglise v. Morrissey*, 142 Wis. 234, 125 N. W. 452.

A judgment or order in proceedings for the appointment of a guardian of an incompetent person and taking from such person the management of his property, is admissible in evidence in any litigation whatever, but not conclusive, to prove the person's mental condition at the time the order or judgment was made, or at any time during which the judgment finds the person incompetent.—See, *Field v. Lucas*, 21 Ga. 447, 68 Am. Dec. 465; *Davis v. Calvert*, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282; *Den v. Clark*, 10 N. J. L. 217, 18 Am. Dec. 417; *Yauger v. Skinner*, 14 N. J. Eq. 389; *Hill's Exrs. v. Day*, 34 N. J. Eq. 150; *Van Deusen v. Sweet*, 51 N. Y. 378; *Rippy v. Gant*, 39 N. C. 443; *Hutchinson v. Sandt*, 4 Rawle (Pa.) 234, 26 Am. Dec. 127; *Willis v. Willis' Admr.*, 12 Pa. St. 159.

A finding of incompetency in guardianship proceedings, or in proceedings upon a writ of *de lunatico inquirendo*, for which the guardianship proceedings are the modern equivalent, is admissible as evidence of the mental condition of the person at the time covered by such finding, notwithstanding that the parties to the

§ 336. Effect of an Adjudication of Incompetency Subsequent to the Making of the Will.

The insanity of a testator subsequent to the execution of his will does not invalidate the instrument; his mental condition when the will was made is the issue. An adjudication that the testator was insane at a date after he had made his will would not cause the presumption that he had been insane at such former time. The presumption of continuance would not apply. Such an adjudication, whether in insanity or in guardianship proceedings, could not of itself establish testamentary incapacity at a prior date.³⁷ Evidence of an adjudication of the insanity or incompetency of testator subsequent to the time he made his will has, in some cases, been rejected on the ground of hearsay and that the parties to the litigation were different, and also on the ground of remoteness. It would seem, however, that such evidence should be equally admissible as the oral testimony of witnesses to prove the mental condition of the testator at or near the time the will was made, and the objection would seem more to the question of the weight and value of such evidence than to its admissibility.³⁸ But if the circum-

litigation are different, and notwithstanding the hearsay rule.—*McAllister v. Rowland* (In re Bullard's Estate), 124 Minn. 27, Ann. Cas. 1915B, 1006, 144 N. W. 412.

³⁷ *Burrows v. Burrows*, 1 Hagg. Ecc. 109; *O'Donnell v. Rodiger*, 76 Ala. 222, 52 Am. Rep. 322; In re *Loveland's Estate*, 162 Cal. 595, 123 Pac. 801; *Greene v. Greene*, 145 Ill. 264, 33 N. E. 941; In re *Harvey's Will*, (Iowa) 94 N. W. 559; *Taylor v. Creswell*, 45 Md.

422; *Brooks v. Barrett*, 7 Pick. (Mass.) 94; *Brady v. McBride*, 39 N. J. Eq. 495.

³⁸ *McAllister v. Rowland* (In re Bullard's Estate), 124 Minn. 27, Ann. Cas. 1915B, 1006, 144 N. W. 412.

See, also, *Emery v. Hoyt*, 46 Ill. 258; *Shirley v. Taylor's Heirs*, 5 B. Mon. (44 Ky.) 99; *Succession of Herbert*, 33 La. Ann. 1099; *Hovey v. Chase*, 52 Me. 304, 83 Am. Dec. 514; In re *Pinney's Will*, 27 Minn.

stances are such that it is entitled to no consideration, it should be rejected.

§ 337. Lucid Intervals.

A person in whom there is an entire want of reason and understanding is designated as *non compos mentis*.³⁹ Such a person, by reason of his affliction, can not make a valid will.⁴⁰ Insanity is best demonstrated where a per-

280, 6 N. W. 791, 7 N. W. 144; Rhoades v. Fuller, 139 Mo. 179, 40 S. W. 760; Jackson v. King, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354; Rippey v. Gant, 39 N. C. 443; Sprinkle v. Wellborn, 140 N. C. 163, 111 Am. St. Rep. 827, 3 L. R. A. (N. S.) 174, 52 S. E. 666.

³⁹ Persons *non compos mentis* were divided by Lord Coke into four classes: (1) idiots, being *non compos* from birth; (2) lunatics, being *non compos* only during the period when understanding is lacking; (3) those who become *non compos* through sickness; and (4) drunkards. The three first mentioned were under the protection of the law, the last only when the results were brought about through the unskillfulness of a physician or the connivance of enemies.—Coke Litt. 246, 247; Bacon's Abr. Tit. Idiots and Lunatics, A.

See, also, *In re Schmidt's Will*, 139 N. Y. Supp. 464, 483.

One merely of mean understanding, as between a wise man and a fool, even though inclined toward the foolish sort, is not for

such reason alone prohibited from making a will, but must be so simple as to believe incredible and impossible things; such a one can not make a testament since he has not the wit of a child.—Swinburne Wills, pt. 2, § 4.

See, also, *Osmond v. Fitzroy*, 3 P. Wms. 129.

⁴⁰ *Duffield v. Robeson*, 2 Har. (Del.) 375; *Elliott's Will*, 2 J. J. Marsh (25 Ky.) 340; *Clark v. Fisher*, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; *Newhouse v. Godwin*, 17 Barb. (N. Y.) 236; *Stewart's Exr. v. Lispenard*, 26 Wend. (N. Y.) 255, 313; *Patterson v. Patterson*, 6 Serg. & R. (Pa.) 55; *Dornick v. Reichenback*, 10 Serg. & R. (Pa.) 84; *Tomkins v. Tomkins*, 1 Bailey L. (S. C.) 92, 19 Am. Dec. 656.

Compare: *Townsend v. Bogart*, 5 Redf. Sur. (N. Y.) 93; *Delafield v. Parish*, 25 N. Y. 9, 27.

Idiocy, whether natural, or arising from accident or disease, renders one incapable of performing the testamentary act. For example, where one received an indenture of the skull, and there-

son fails to react to the common facts, events and experiences of life.⁴¹ But the fact that one is afflicted with insanity does not prevent him from executing a valid will, provided the same is made during a lucid interval.⁴²

after became simple, incapable of carrying on connected conversation, of estimating the value of money, unable to count higher than ten, to tell the time by a clock, liable to lose her way on familiar streets, having no idea of the value or extent of her property, she was considered not to possess a disposing mind.—*Townsend v. Bogart*, 5 Redf. Sur. (N. Y.) 93.

⁴¹ *In re Gedney's Will*, 142 N. Y. Supp. 157, 175.

The legal tests of insanity differ from the medical tests, the reason for this being that while mental malady may be pronounced enough to need curative treatment, it may not be pronounced enough to denote legal incapacity.—*In re Schmidt's Will*, 139 N. Y. Supp. 464; *In re Martin's Will*, 82 Misc. Rep. 574, 144 N. Y. Supp. 174, 179.

⁴² *Swinburne*, pt. 2, § 3, pl. 3; *Brogden v. Brown*, 2 Addams Ecc. 441; *Kemble v. Church*, 3 Hagg. Ecc. 273; *Rodd v. Lewis*, 2 Lee Ecc. 176; *Hall v. Warren*, 9 Ves. Jun. 610; *Beverley's Case*, 4 Coke 123; *Nichols and Freeman v. Binns*, 1 S. W. & Tr. 239; *Clark v. Fisher*, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; *In re Schmidt's Will*, 139 N. Y. Supp. 464, 477; *In re Silverthorn*, 68 Wis. 372, 32 N. W. 287.

In *Cartwright v. Cartwright*, 1 Phillim. 90, the facts were that a lady badly afflicted with permanent insanity and living under restraint, but who was proved to have had intermissions of her complaint, drew up, without assistance and in proper form, a will in her own handwriting. At the moment of preparing the instrument she was apparently considerably excited, tearing up several pieces of paper and throwing them into the fire. After acting wildly and muttering to herself, she drew up her will and, calling for a candle, sealed the same. The survivor of the two witnesses to the transaction testified that during the time the testatrix was writing, covering a space of more than an hour, her manner and actions showed many signs of insanity. The will was written in a remarkably clear hand, without blots or grammatical errors, and its provisions were in conformity with her affections at that time. Some two months after drawing the will she mentioned the fact and, after having it brought to her, delivered it to her mother stating that there was no need of witnesses since all of the estate was personal and that the will was in her own handwriting. Sir William Wynne pronounced the will valid. Among

If a testator is of sound mind when he executes his will, it is immaterial what his mental condition may have been prior to that time, or what it subsequently might be.⁴³

other things he said: "Now I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself; that I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done the whole case is proved. What can you do more to establish the act? because, suppose you are able to shew the party did that which appears to be a rational act, and it is his own act entirely, nothing is left of the presumption in order to prove a lucid interval." In *Nichols and Freeman v. Binns*, 1 Sw. & Tr. 239, the foregoing decision and language are commented on and distinguished, Sir C. Creswell saying: "The mere fact that the act is rational, and done in a rational manner, is not, I think, in itself conclusive evidence of sanity; although in every case it will be very strong evidence of sanity, tending greatly to satisfy the mind of a rational person that the party so doing that act was at the time in full possession of his senses. But after a paroxysm of insanity has passed away, insanity may still be lurking in the mind of the patient although there is nothing apparent on the surface to show it." The remarks of Sir William Wynne were further ques-

tioned in *Chambers v. Queen's Proctor*, 2 Curt. 415, 447, where it is said: "That Sir William Wynne did not consider every rational act rationally performed as sufficient to prove a lucid interval, we may collect from what is stated in a subsequent part of his judgment, in which he refers to cases where testamentary acts of a rational character were set aside. So that it is not every rational act rationally done, which, under all circumstances, is sufficient to constitute a lucid interval; it was the particular manner in which the act was done in that case which led Sir William Wynne to the conclusion that there was a lucid interval."

As to the character of the provisions of the will being evidence on the issue of testamentary capacity, see, post, §§ 354, 355.

It has been held in Louisiana that although a person be habitually insane, it will be presumed that he made his will in a lucid interval if it was drawn without the assistance of others, and contained nothing sounding in folly; and that it will devolve upon those who contest its validity to show insanity at the moment it was made.—*Kingsbury v. Whitaker*, 32 La. Ann. 1055, 36 Am. Rep. 278.

⁴³ *Ayrey v. Hill*, 2 Addams Ecc. 206, 210; *Billinghurst v. Vickers*, 1 Phillim. 187, 191; *Greene v.*

§ 338. The Same Subject: Description and Proof.

A lucid interval, as the term is used in connection with insane persons, is not merely a cessation of the violent symptoms of the disorder, but a temporary restoration of intelligence to the degree necessary for a sound and disposing mind, and testamentary capacity.⁴⁴ When habitual insanity has been established, the burden is on the proponent of the will to show that it was executed during a lucid interval.⁴⁵ The proof of such a lucid interval must

Greene, 145 Ill. 264, 33 N. E. 941; James White Memorial Home v. Haeg, 204 Ill. 422, 68 N. E. 568; Bundy v. McKnight, 48 Ind. 502, 511; In re Harvey's Will (Iowa) 94 N. W. 559; Shailer v. Bumstead, 99 Mass. 112; Von De Veld v. Judy, 143 Mo. 348, 44 S. W. 1117; Stull v. Stull, 1 Neb. (Unof.) 380, 389, 96 N. W. 196.

⁴⁴ Hall v. Warren, 9 Ves. Jun. 605; In re Miller's Will, 3 Boyce (26 Del.) 477, 85 Atl. 803; In re Gangwere's Estate, 14 Pa. St. 417, 52 Am. Dec. 554.

⁴⁵ Cartwright v. Cartwright, 1 Phillim. 90, 100; Nichols v. Binns, 1 Sw. & Tr. 239; Steed v. Calley, 1 Keen 620; Baker v. Butt, 2 Moore P. C. C. 317; Barry v. Butlin, 2 Moore P. C. C. 480; Martin v. Johnston, 1 Fost. & F. 122; White v. Driver, 1 Phillim. 84; Tatham v. Wright, 2 Russ. & M. 31; Boughton v. Knight, L. R. 3 P. & D. 64; Kemble v. Church, 3 Hagg. Ecc. 273; Borlase v. Borlase, 4 Notes of Cas. 106; Saxon v. Whitaker, 30 Ala. 237; Rush v. Megee, 36 Ind. 69; Chandler v.

Barrett, 21 La. Ann. 58, 99 Am. Dec. 701; Halley v. Webster, 21 Me. 461; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Crowninshield v. Crowninshield, 2 Gray (Mass.) 524; Whitenach v. Stryker, 2 N. J. Eq. 8; Goble v. Grant, 3 N. J. Eq. 629; Jackson v. Van Dusen, 5 Johns. (N. Y.) 144, 159, 4 Am. Dec. 330; Clark v. Fisher, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; Delafield v. Parish, 25 N. Y. 9; Gombault v. Public Admr., 4 Bradf. (N. Y.) 226; Boyd v. Eby, 8 Watts. (Pa.) 66.

In Cartwright v. Cartwright, 1 Phillim. 90, Sir William Wynne says: "If you can establish that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it; but the effect of it is this, it inverts the order of proof and of presumption, for, until proof of habitual insanity is made, the presumption is that the party agent like all hu-

be clear.⁴⁶ In those countries where the civil law prevails, proof of legal capacity in cases of partial insanity is extremely difficult, and the courts look with disfavor upon evidence which is computed by days and hours in order to show a lucid interval during which the testator had testamentary capacity.⁴⁷

§ 339. The Law Deals With the Effect of the Mental Derangement, Not Its Cause.

The unsoundness of mind which the law contemplates as incapacitating a testator from making a valid testamentary disposition of his property under the rule before announced, may be the result of many causes, such as mental diseases, senile *dementia*, fevers, injuries, drugs,

man creatures was rational; but where an habitual insanity in the mind of the person who does the act is established, there the party who would take advantage of the fact of an interval of reason must prove it."

⁴⁶ *White v. Driver*, 1 Phillim. 84; *Ayrey v. Hill*, 2 Addams Ecc. 206, 210; *Brogden v. Brown*, 2 Addams Ecc. 441, 445.

In *White v. Driver*, 1 Phillim. 84, Sir John Nicholl, after referring to proof that the testatrix had been insane for several years prior to the execution of her will, and in admitting the instrument to probate, says: "The evidence, however, does not preclude the proof of lucid intervals, although it raises a strong presumption against sanity, for I agree with counsel for the next of kin that, wherever previous insanity is

proved, the burden of proof is shifted, and it lies on those who set up the will to adduce satisfactory proof of sanity at the time the act was done. It is scarcely possible, indeed, to be too strongly impressed with the degree of caution necessary to be observed in examining the proof of a lucid interval; but the law recognizes the acts done during such an interval as valid, and the law must not be defeated by any overstrained demands of the proof of the fact."

⁴⁷ In *re Martin's Will*, 82 Misc. Rep. 574; 144 N. Y. Supp. 174, 187.

See, also, In *re Van Ness' Will*, 78 Misc. Rep. 592, 139 N. Y. Supp. 485, 493; In *re Swartz' Will*, 79 Misc. Rep. 388, 139 N. Y. Supp. 1105, 1113.

intoxicants, or the like. The last mentioned factors are the various causes, but with them the law is not directly concerned. It is the effect with which the law must deal, from whatsoever source it may have sprung, and it is the quantity of the effect which the law must judge.⁴⁸

§ 340. Effect of Partial Loss of Memory.

The memory of a testator may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he has been intimately acquainted; he may at times ask idle questions and repeat those which had before been asked and answered; yet his understanding may be sufficiently sound for many of the ordinary transactions of life.⁴⁹ Thus, great mental and physical weakness, accompanied by a partial failure of memory, caused by paralysis, is said not to be in itself a sufficient indication of testamentary incapacity.⁵⁰ Yet

⁴⁸ *Stedham v. Stedham*, 32 Ala. 525; *Naylor v. McRuer*, 248 Mo. 423, 154 S. W. 772, 784; *Garrison v. Blanton*, 48 Tex. 299.

⁴⁹ *Taylor v. Kelly*, 31 Ala. 59, 98, 68 Am. Dec. 150; *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881; *Watson v. Watson*, 2 B. Mon. (Ky.) 74; *Den v. Vancleve*, 5 N. J. L. 589; *Stackhouse v. Horton*, 15 N. J. Eq. 203, 206; *Matter of Donohue*, 97 App. Div. (N. Y.) 205, 89 N. Y. Supp. 871; *Napfle's Estate*, 134 Pa. St. 492, 19 Atl. 679.

⁵⁰ *Hall v. Dougherty*, 5 Houst. (Del.) 435.

Weakness, or occasional foolishness, or lacking the average men-

tal capacity of his neighbors, does not indicate testamentary incapacity.—*Rice v. Rice*, 50 Mich. 448, 15 N. W. 545.

Testamentary incapacity is not shown by a mere inability to remember the names of relatives not immediately in the testator's presence.—*Kramer v. Weinert*, 81 Ala. 414, 1 So. 26.

Want of memory, vacillation of purpose, credulity, vagueness of thought, all may exist in connection with testamentary capacity.—*Hopple's Estate*, 13 Phila. (Pa.) 259.

A testator seventy-five years of age, afflicted with softening of the

it is not sufficient that a testator be able to answer familiar and usual questions; he must be able to make a disposition of his property with understanding.⁵¹

The mind of a testator may be broken, impaired and shattered by disease, as is often the case with those who reach advanced age; yet if he comprehend the act he is performing, and have the strength of mind to form a fixed intention and to summon his scattered and enfeebled thoughts so as to enable him to execute that intention, he is not incapacitated to make a will. If he can not do this, it matters not whether such incapacity is the effect of a disordered or of an enfeebled intellect.⁵² Evidence of partial failure of memory, forgetfulness and the like, however, is admissible and is to be considered in connection with all other evidence in the case, in determining the question of testamentary capacity.⁵³

§ 341. Infirmities of Old Age Do Not Establish Testamentary Incapacity.

Mere lapse of years can not establish incapacity; no one can live so long that he will, for such reason, be rendered incapable of making a testamentary disposition of

brain and fits of neurasthenic prostration, has been considered capable of making a simple will during intervals in which his mind was reasonably clear.—In *re Silverthorn*, 68 Wis. 372, 32 N. W. 287.

⁵¹ *Marsh v. Tyrrell*, 2 Hagg. Ecc. 84, 122; *Blewitt v. Blewitt*, 4 Hagg. Ecc. 410, 419; *Winchester's Case*, 6 Coke 23; *Harrison v. Rowan*, 3 Wash. C. C. 580, 586, Fed. Cas. No. 6141; *Hall v. Hall*, 18

Ga. 40; *Shropshire v. Reno*, 5 J. J. Marsh (Ky.) 91; *Brown v. Torrey*, 24 Barb. (N. Y.) 583; *Boyd v. Eby*, 8 Watts (Pa.) 66, 70; *McTaggart v. Thompson*, 14 Pa. St. 149.

⁵² *Stackhouse v. Horton*, 15 N. J. Eq. 202, 205.

See, also, *Bever v. Spangler*, 93 Iowa 576, 61 N. W. 1072.

⁵³ *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881; *Bush v. Delano*, 113 Mich. 321, 71 N. W. 628.

his estate.⁵⁴ No presumption of incapacity arises merely because of advanced years.⁵⁵ The infirmities of old age, weakness of body and irritability of temper, are not, in themselves, sufficient to establish a lack of testamentary capacity.⁵⁶ The fact that the testator was of advanced years and that his sight was failing, will not, standing

⁵⁴ *Townsend v. Bogart*, 5 Redf. (N. Y.) 93; *Matter of Henry*, 18 Misc. Rep. 149, 41 N. Y. Supp. 1096; *In re Carpenter's Will*, 145 N. Y. Supp. 365, 371.

It has been truly said: "Old age is solitary, and often the only way in which an old person can command the attention to his infirmities that they merit is the right of disposition of his property by will." Old age alone does not deprive one of the capacity to make a will, but on the contrary is a reason for protection.—*In re Carpenter's Will*, 145 N. Y. Supp. 365, 371; *Maverick v. Reynolds*, 2 Bradf. (N. Y.) 360; *Van Alst v. Hunter*, 5 Johns. Ch. (N. Y.) 148.

The power to will property gives encouragement to industry; it stimulates accumulation; it furnishes new motives to the love of the parent and increases the strength of paternal authority; it adds new incentives to obedience to the child, and provides additional assurance against his misconduct or ingratitude. By extending the power of the present generation over the next, it enables old age to command kindness and respect, and strengthen the ties which bind it to youth.—

In re Carpenter's Will, 145 N. Y. Supp. 365, 371.

See, also, *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167; *Deering v. Adams*, 37 Maine 264.

⁵⁵ *Creely v. Ostrander*, 3 Bradf. (N. Y.) 107; *In re Carpenter's Will*, 145 N. Y. Supp. 365, 371.

⁵⁶ *Estate of MacCrellish*, 167 Cal. 711, 141 Pac. 257, L. R. A. 1915A, 443; *Estate of Clark*, 170 Cal. 418, 423, 149 Pac. 828; *Geiger v. Bardwell*, 255 Ill. 320, 99 N. E. 582; *Wiley v. Gordan*, 181 Ind. 252, 104 N. E. 500; *Philpott v. Jones*, 164 Iowa 730, 146 N. W. 859; *In re Ferris' Estate*, (Mich.) 157 N. W. 380; *Jackson v. Hardin*, 83 Mo. 175; *Turner v. Butler*, 253 Mo. 202, 161 S. W. 745; *Byrne v. Fulkerson*, 254 Mo. 97, 162 S. W. 171; *In re McCabe's Will*, 75 Misc. Rep. 35, 134 N. Y. Supp. 682; *In re D'Arschot's Will*, 82 Misc. Rep. 16, 143 N. Y. Supp. 732; *Phillips v. Flagler*, 82 Misc. Rep. 500, 143 N. Y. Supp. 798; *In re Crockett's Will*, 86 Misc. Rep. 631, 149 N. Y. Supp. 477; *In re Neil's Estate*, 90 Misc. Rep. 537, 153 N. Y. Supp. 647; *Howard v. Howard*, 112 Va. 566, 72 S. E. 133.

alone, justify setting aside his will.⁵⁷ Neither feebleness of intellect nor mere weakness of mind, whether the result of injury, disease or other causes, nor partial failure of mind or memory, even to a considerable extent, will in themselves prove testamentary inability.⁵⁸ The fact that the testator was old and in feeble health, or that his mind had failed to such an extent as to render him incapable of properly transacting complex business matters, or that he had excluded from benefiting under his will some or all of his legal heirs, will not, alone, defeat his testament.⁵⁹

§ 342. The Same Subject.

Great age, feebleness, infirmity, or disease, none of them, standing alone, will render a testator incapable of disposing of his estate by will.⁶⁰ It is immaterial how

For examples, see: *Lowe v. Williamson*, 2 N. J. Eq. 82, sustaining the will of one eighty years old, deaf, and of defective vision; *In re Reed's Will*, 2 B. Mon. (Ky.) 79, sustaining the will of a testator of eighty, palsied, and unable to write or to feed himself; *Wilson v. Mitchell*, 101 Pa. St. 495, sustaining a will, reasonable in its provisions, of a testator over one hundred years of age, blind, partially deaf, and of defective memory.

⁵⁷ *Estate of Motz*, 136 Cal. 558, 69 Pac. 294; *Estate of Dole*, 147 Cal. 188, 81 Pac. 534; *In re Pack-er's Estate*, 164 Cal. 525, 129 Pac. 778.

⁵⁸ *Rodney v. Burton*, 4 Boyce (27 Del.) 171, 86 Atl. 826, 828; *Webber v. Sullivan*, 58 Iowa 260,

12 N. W. 319; *Meeker v. Meeker*, 74 Iowa 352, 7 Am. St. Rep. 489, 37 N. W. 773; *Perkins v. Perkins*, 116 Iowa 253, 90 N. W. 55; *Philpott v. Jones*, 164 Iowa 730, 146 N. W. 859, 861.

⁵⁹ *In re Allison's Estate*, 104 Iowa 130, 73 N. W. 489; *In re Evans' Estate*, 114 Iowa 240, 86 N. W. 283; *Philpott v. Jones*, 164 Iowa 730, 146 N. W. 859, 861. See, also, citations in preceding note.

⁶⁰ *Estate of Motz*, 136 Cal. 558, 562, 69 Pac. 294; *Estate of Morey*, 147 Cal. 495, 503, 82 Pac. 57; *Estate of Webber*, 15 Cal. App. 224, 114 Pac. 597; *Hackett's Estate*, 33 S. D. 208, 145 N. W. 437.

The fact that a testator is in a dying condition and extremely physically enfeebled when he makes his will does not show in-

great the testator's physical and bodily afflictions may be if he is of such sound mind as the law considers necessary to testamentary capacity.⁶¹ But from whatever cause, if the mental intelligence of the testator does not measure up to the rule, he can not make a valid will; and although the infirmities of old age do not establish a lack of testamentary capacity, yet lack of capacity is none the less fatal because resulting from such causes.⁶²

§ 343. The Same Subject: A Question of Fact.

The wills of aged persons, and all the circumstances attending their execution, should be scrutinized by the

capacity, but such testimony gains significance where there is also evidence of mental feebleness.—*In re Doolittle's Estate*, 153 Cal. 29, 94 Pac. 240.

The fact that the testator may have been mentally weak does not deprive him of testamentary capacity so long as he can reasonably comprehend the nature of his testamentary act, the extent of his estate, and the claims upon him of his family and friends.—*Hanrahan v. O'Toole*, 139 Iowa 229, 117 S. W. 675.

Old age and extreme illness do not in themselves show testamentary capacity.—*In re Webber's Estate*, 15 Cal. App. 224, 114 Pac. 597; *Lindsey v. Stephens*, 229 Mo. 600, 129 S. W. 641.

Although the mind of the testatrix had become enfeebled because of physical illness, such fact was held insufficient to show mental incapacity where it was shown that she knew what her property

consisted of, the amount of her income, the natural expectancies of those about her, and had transacted most of her business herself.—*Southside Trust Co. v. McGrew*, 219 Pa. 606, 69 Atl. 79.

A man seventy years of age, capable of attending to the affairs of life, but unable to read or write, has testamentary capacity. *Wood's Exr. v. Wood*, 109 Va. 470, 63 S. E. 994.

⁶¹ *Porter v. La Rue*, (Mich.) 158 N. W. 851; *In re Hobbin's Estate*, 41 Mont. 39, 108 Pac. 7; *In re Eddy*, 32 N. J. Eq. 701; *Merrill v. Rush*, 33 N. J. Eq. 537; *Snyder v. Sherman*, 23 Hun (N. Y.) 139; *In re Ames' Will*, 40 Or. 495, 67 Pac. 737; *In re Pickett's Will*, 49 Or. 127, 89 Pac. 377; *Stevens v. Myers*, 62 Or. 372, 121 Pac. 434, 126 Pac. 29; *State v. Goodman*, 133 Tenn. 375, 181 S. W. 312.

⁶² *Byrne v. Fulkerson*, 254 Mo. 97, 162 S. W. 171, 178.

court;⁶³ and where one has sunken into "second childishness and mere oblivion," he can not execute a valid will.⁶⁴ But the testamentary capacity of aged persons is generally a question of fact.⁶⁵ While senile *dementia*, or imbecility from old age, does not necessarily exclude the possibility of testamentary capacity,⁶⁶ and although it begins gradually, yet it is progressive in character, and in its advanced stages "the brain is well-nigh stripped of its functions." The difficulty in such cases is to determine how far the affliction must progress before it has blotted out the understanding necessary to make a will.⁶⁷

§ 344. Insane Delusions Defined.

A person may be mentally afflicted as to some subject or object, yet be sane as to all other matters. Such a condition does not comprehend a general weakening of the mind, but refers to a mental disturbance regarding some particular subject or some particular object. Such a mental condition is often referred to as monomania or partial insanity, or that the person afflicted is suffering from a delusion or an hallucination. A person may be competent to conduct his business and to rationally attend

⁶³ *Kinleside v. Harrison*, 2 Phil. 449, 461; *Griffiths v. Robins*, 8 Madd. 192; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Kirkwood v. Gordon*, 7 Rich. (S. C.) 474, 62 Am. Dec. 418.

⁶⁴ *Lewis v. Pead*, 1 Ves. Jun. 19; *Bird v. Bird*, 2 Hagg. Ecc. 142; *Sloan v. Maxwell*, 3 N. J. Eq. 563, 581; *Van Alst v. Hunter*, 5 Johns. Ch. (N. Y.) 148.

⁶⁵ *Mackenzie v. Handasyde*, 2 Hagg. Ecc. 211; *Bird v. Bird*, 2

Hagg. Ecc. 142; *Stevens v. Van Cleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13412; *Watson v. Watson*, 2 B. Mon. (Ky.) 74; *Andress v. Weller*, 3 N. J. Eq. (2 Green Ch.) 605; *Nailing v. Nailing*, 2 Sneed (Tenn.) 630.

⁶⁶ *Wisner v. Chandler*, 95 Kan. 36, 147 Pac. 849.

⁶⁷ *Bensberg v. Washington University*, 251 Mo. 641, 658, 158 S. W. 330; *Byrne v. Fulkerson*, 254 Mo. 97, 162 S. W. 171, 178.

to the ordinary affairs of life, yet be under a *dementia* as to one or more particular subjects, objects or applications. He may possess some irrational idea which would not be entertained by a sane thinking person. The mind may be so disordered that it imagines something to exist, or imputes existence to an imaginary offense. A delusion has been described as the spontaneous product of the subjective processes of a disordered intellect, inducing a belief without any support in extrinsic evidence. If spontaneity is lacking, and extraneous reason, however slight, be present to induce the belief, such reason as would arrest the attention of a deliberative mind, there is no delusion. An error of judgment upon facts does not constitute a delusion, however imperfect may be the process of reasoning, even though there may have been a misapprehension of facts and an unreasonable conclusion drawn.⁶⁸ An insane delusion is generally accompanied

⁶⁸ Dew v. Clark, 1 Addams Ecc. 279, 3 Addams Ecc. 79; Greenwood's Case, cited in 13 Ves. Jun. 89; Stackhouse v. Horton, 15 N. J. Eq. 202, 228; Stevens v. Myers, 62 Or. 372, 121 Pac. 434, 438, 126 Pac. 29; In re Diggin's Estate, 76 Or. 341, 149 Pac. 73; Snell v. Weldon, 243 Ill. 496, 90 N. E. 1061; Zinkula v. Zinkula, 171 Iowa 287, 154 N. W. 158; Fulton v. Freeland, 219 Mo. 494, 131 Am. St. Rep. 576, 118 S. W. 12; In re Herr's Estate, 251 Pa. St. 223, 96 Atl. 464; In re Alexander's Estate, 246 Pa. St. 58, Ann. Cas. 1916C, 33, 91 Atl. 1042; Irwin v. Lattin, 29 S. D. 1, Ann. Cas. 1914C, 1044, 135 N. W. 759.

An insane delusion is present

when a person imagines a certain state of facts exists which has no reality except in the imagination of the party, and which false impression can not be removed by any amount of reasoning and argument. See: In re Reardon's Estate, 13 Cal. App. 313, 109 Pac. 629; Bundy v. McKnight, 48 Ind. 502, 512; Coffey v. Miller, 160 Ky. 415, 169 S. W. 852; Merrill v. Rolston, 5 Redf. (N. Y.) 220.

A belief in any purely esoteric or abstract subject is speculative and incapable of disproof by facts, and therefore is not regarded as an insane delusion; as, for instance, the belief of a parent that a child does not love him as much as she ought to or as much as

by eccentricity, irritability, violence, suspicion, exaggeration and inconsistency; but retention of memory, display of talents, enjoyment of amusements and the appearance of rationality on various subjects are not inconsistent with unsoundness of mind in other particulars.⁶⁹

§ 345. Unless the Provisions of the Will Are Affected by the Insane Delusion, the Instrument Is Not Invalidated.

All insane delusions do not render one incapable of making a will. A testator may have delusions regarding

the parent desires, can not be said as a matter of law to be an insane delusion, yet the belief of a parent that a child does not love him at all may be an insane delusion, since it would be possible of disproof.—Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405. See, also, Leffingwell v. Bettinghouse, 151 Mich. 513, 115 N. W. 731; Fulton v. Freeland, 219 Mo. 494, 131 Am. St. Rep. 576, 118 S. W. 12.

Disclaiming paternity of and dis-inheriting his children, where the testator founded his belief upon false testimony, does not establish an insane delusion, although the rule would be the opposite if there were no foundation for the belief.—Morgan v. Morgan, 30 App. D. C. 436.

It is not evidence of an insane delusion where a testator stubbornly clings to a belief contrary to a decision of the court establishing his common law marriage, he yielding to the force of the judgment.—Hutchinson v. Hutchinson, 250 Ill. 170, 95 N. E. 143.

Faulty reasoning is not of itself evidence of a general mental derangement.—Conner v. Skaggs, 213 Mo. 334, 111 S. W. 1132.

Where the will of a testator is the result of an unfounded delusion that his children had deprived him of certain property, such will should be rejected.—Holton v. Cochran, 208 Mo. 314, 106 S. W. 1035.

But hatred toward children because of their sympathy with the wife of the testator, with whom he had not been on friendly terms, does not prove an insane delusion.—Bauchens v. Davis, 229 Ill. 557, 82 N. E. 365.

Moral insanity not accompanied by delusions does not render one incapable of the testamentary act.—Frere v. Peacocke, 1 Rob. Ecc. 442; Boardman v. Woodman, 47 N. H. 120; Forman's Will, 54 Barb. (N. Y.) 274.

⁶⁹ Dew v. Clark, 3 Addams Ecc. 79; Rodney v. Burton, 4 Boyce (27 Del.) 171, 86 Atl. 826, 830.

matters which do not affect or concern his testamentary act and which have no influence upon the disposition which he makes of his estate. In such a case, if the testator is otherwise mentally qualified, the existence of such delusions would not invalidate his will.⁷⁰ Since the decision of Sir John Nicholl,⁷¹ the question as to the effect of a delusion or an hallucination may be regarded as settled. The authorities are uniform that an instrument, the provisions of which were caused or affected by an insane delusion, can not be a will. Although one may be possessed of testamentary capacity, yet if he executes a document as a will because, for instance, of some imaginary wrong or offense which has beclouded his reason and which causes him to disinherit a daughter or a son, such alleged will is void.⁷² And the converse of the

⁷⁰ Banks v. Goodfellow, L. R. 5 Q. B. 549; Boughton v. Knight, L. R. 3 P. & D. 64; Zinkula v. Zinkula, 171 Iowa 287, 154 N. W. 158; Roche v. Nason, 105 App. Div. 256, 93 N. Y. Supp. 565, affirmed 185 N. Y. 128, 77 N. E. 1007; Irwin v. Lattin, 29 S. D. 1, Ann. Cas. 1914C, 1044, 135 N. W. 759.

⁷¹ Dew v. Clark, 1 Addams Ecc. 279, 3 Addams Ecc. 79.

⁷² Cotton v. Ulmer, 45 Ala. 378, 6 Am. Rep. 703; Estate of Redfield, 116 Cal. 637, 652, 48 Pac. 794; Estate of Scott, 128 Cal. 57, 62, 60 Pac. 527; Estate of Kendrick, 130 Cal. 360, 364, 62 Pac. 605; Estate of Reardon, 13 Cal. App. 313, 109 Pac. 629; Lucas v. Parsons, 24 Ga. 640, 71 Am. Dec. 147; Evans v. Arnold. 52 Ga.

169; Bradley v. Onstott, 180 Ind. 687, 103 N. E. 798, 800; Coffey v. Miller, 160 Ky. 415, Ann. Cas. 1916C, 30, 169 S. W. 852; Haines v. Hayden, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911; Rivard v. Rivard, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681; Thayer v. Thayer, 188 Mich. 261, 154 N. W. 32; Benoist v. Murrin, 58 Mo. 307; Stackhouse v. Horton, 15 N. J. Eq. 202; Taylor v. Trich, 165 Pa. St. 586, 44 Am. St. Rep. 679, 30 Atl. 1053; Estate of Alexander, 246 Pa. St. 58, Ann. Cas. 1916C, 33, 91 Atl. 1042; In re Herr's Estate, 251 Pa. St. 223, 96 Atl. 464.

The hallucination or delusion must bear directly upon and influence the creation and terms of the testamentary instrument. It would not be sufficient, to avoid a will,

doctrine is equally well settled. Where the partial insanity or the delusions or hallucinations which are the offspring of it, can not reasonably be conceived to have biased the testator nor to have influenced him in consid-

to show that the testator believed that the moon was made of green cheese, but if it should be established, in addition thereto, that because of this belief he devised or bequeathed his property in a way which, saving for the belief he would not have done, a case is presented where the abnormality of mind has a direct influence upon the testamentary act.—*In re Chevallier's Estate*, 159 Cal. 161, 113 Pac. 130, 133; *In re Purcell's Estate*, 164 Cal. 300, 128 Pac. 932, 937.

Where the testator had mental capacity to know how he wanted his will drawn, but not to transact business generally in a sane manner, on account of an insane delusion; in other words, where he knew what he was doing but had an insane reason for doing it, he does not possess testamentary capacity.—*Harbison v. Beets*, 84 Kan. 11, 113 Pac. 423.

Where a testator, eighty years of age, had suffered from sunstroke and from delirium tremens, and was under a delusion that his wife and son were trying to kill him, it was considered sufficient evidence of testamentary incapacity.—*Edge v. Edge*, 38 N. J. Eq. 211. But a delusion as to the testator's physical condition, or the cause thereof, does not affect his

capacity.—*Hollinger v. Syms*, 37 N. J. Eq. 221. And a delusion that the testator's wife was unchaste and his son illegitimate has under certain circumstances been held not to have influenced the provisions of the will.—*In re Cole's Will*, 49 Wis. 179, 5 N. W. 346. A testator's belief that his daughter was a witch was held insufficient to set aside a will discriminating against her and another child, where it appeared that the ground of discrimination was their disobedience to their parent; and that the testator, although believing in witchcraft at the time of making the will, did not entertain the delusion respecting his daughter until after his will had been made.—*Schildnecht v. Rompf*, 9 Ky. Law Rep. 120, 4 S. W. 235. Yet apparently in opposition to this rule, in New York, a delusion that his body was to be preserved through all time, in connection with other eccentricities, was considered a sufficient cause for rejecting the will of one who manifested business capacity in ordinary transactions.—*Morse v. Scott*, 4 Dem. Sur. (N. Y.) 507. The fact that an aged testator was sick and often delirious with fever, does not show mental incapacity.—*Clark's Heirs v. Ellis*, 9 Or. 128.

ering the claims upon him of those who are the natural objects of his bounty, then the mental unsoundness is not of such a degree as to render him incapable of making his will. Unless the delusion or hallucination as to facts is such as to enter in some way into the particular dispositions of the will of the deluded person, such delusion or hallucination will not in itself afford controlling evidence of testamentary incapacity.⁷³

73 Boughton v. Knight, L. R. 3 P. & D. 64; Banks v. Goodfellow, L. R. 5 Q. B. 549; Smee v. Smee, L. R. 5 Prob. Div. 84; Cotton v. Ulmer, 45 Ala. 378, 6 Am. Rep. 703; Gardner v. Lamback, 47 Ga. 133, 169; Dunham's Appeal, 27 Conn. 192; Crum v. Thornley, 47 Ill. 192; Hite v. Sims, 94 Ind. 333, 335, 336; Harbison v. Boyd, 177 Ind. 267, 96 N. E. 587; Zinkula v. Zinkula, 171 Iowa 287, 154 N. W. 158; James v. Langdon, 7 B. Mon. (46 Ky.) 193; Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; Brown v. Ward, 53 Md. 376, 36 Am. Rep. 422; Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882; Rice v. Rice, 50 Mich. 448, 15 N. W. 545; Benoist v. Murrin, 58 Mo. 307; Boardman v. Woodman, 47 N. H. 120; Lee v. Scudder, 31 N. J. Eq. 633; Coit v. Patchen, 77 N. Y. 533; Dobie v. Armstrong, 160 N. Y. 584, 55 N. E. 302; La Bau v. Vanderbilt, 3 Redf. Sur. (N. Y.) 384; Thompson v. Quimby, 2 Bradf. Sur. (N. Y.) 449; s. c. sub. nom. Thompson v. Thompson, 21 Barb. (N. Y.) 107; Bonard's Will, 16 Abb. Pr. N. S. (N. Y.) 128; American Seaman's Friend Society

v. Hopper, 43 Barb. (N. Y.) 625; Lathrop v. American Board of Foreign Missions, 67 Barb. (N. Y.) 590; Matter of Donohue's Will, 97 App. Div. 205, 89 N. Y. Supp. 871; Matter of Hock's Will, 74 Misc. Rep. 15, 129 N. Y. Supp. 196; In re Campbell's Will, 136 N. Y. Supp. 1086, 1100; In re Carpenter's Will, 145 N. Y. Supp. 365, 372; Boyd v. Eby, 8 Watts (Pa.) 66; Tawney v. Long, 76 Pa. St. 106; Taylor v. Trich, 165 Pa. St. 586, 44 Am. St. Rep. 679, 30 Atl. 1053; Thomas v. Carter, 170 Pa. St. 272, 50 Am. St. Rep. 770, 33 Atl. 81; McGovran's Estate, 185 Pa. St. 203, 39 Atl. 816; Hemingway's Estate, 195 Pa. St. 291, 78 Am. St. Rep. 815, 45 Atl. 726; Englert v. Englert, 198 Pa. St. 326, 82 Am. St. Rep. 808, 47 Atl. 940; Buchanan v. Pierie, 205 Pa. St. 123, 97 Am. St. Rep. 725, 54 Atl. 583; Appeal of Ross, (In re Hart's Estate) 243 Pa. St. 119, 89 Atl. 816; In re Herr's Estate, 251 Pa. St. 223, 96 Atl. 464; Irwin v. Lat-tin, 29 S. D. 1, Ann. Cas. 1914C, 104 135 N. W. 759; Gass' Heirs v. Gass' Exrs., 3 Humph. (Tenn.)

§ 346. Unusual Religious Beliefs, Spiritualism, and the Like, in Themselves Do Not Establish Incapacity.

The law takes no account of a man's religion. It can not say that one is sane because he believes in the dogmas which are generally accepted by those about him, and that another is insane because he announces or accepts some doctrine, new or old, which may shock the sensibilities of a devout believer in a so-called orthodox faith. However, peculiarities in this regard may be admitted in evidence, and if it can be shown that the testator's will was wholly the result of some peculiar religious belief without which the will would not have been made, his testamentary capacity may be doubted.⁷⁴ But it can not be said as a matter of law that a person is insane because he holds the belief that he can communicate with spirits, and is advised and directed by them in his business transactions and in the disposition of his property.⁷⁵ A peculiar belief

278; *Cole's Will*, 49 Wis. 179, 5 N. W. 346.

⁷⁴ *Whitham v. Hilton*, 78 Wash. 446, Ann. Cas. 1916B, 260, 139 Pac. 209.

On an issue of testamentary capacity involving a belief in spiritualism, it is error to exclude evidence that from the standpoint of a spiritualist, there was nothing irrational in the fact that the testator believed that a medium in a trance could cause him harm. Although evidence of the truth or falsity of spiritualistic beliefs are inadmissible, yet one may be so blindly governed by spiritualistic communications as to make his will, which is the result thereof, invalid, whether it is claimed that

the testator lacked testamentary capacity or was unduly influenced. —*O'Dell v. Goff*, 149 Mich. 152, 119 Am. St. Rep. 662, 10 L. R. A. (N. S.) 989, 112 N. W. 736.

⁷⁵ *Lyon v. Home*, L. R. 6 Eq. Cas. 655; *Matter of Spencer*, 96 Cal. 448, 31 Pac. 453; *Owen v. Crumbaugh*, 228 Ill. 380, 119 Am. St. Rep. 442, 10 Ann. Cas. 606, 81 N. E. 1044; *Otto v. Doty*, 61 Iowa 23, 15 N. W. 578; *Raison v. Raison*, 148 Ky. 116, 146 S. W. 400; *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422; *Woodbury v. Obear*, 7 Gray (Mass.) 467, 470; *Dunham v. Holmes* (Mass.), 113 N. E. 845; *McClary v. Stull*, 44 Neb. 175, 62 N. W. 501; *Middleditch v. Williams*, 45 N. J. Eq. 726, 4 L. R. A.

as to a future state,⁷⁶ or in other matters,⁷⁷ a belief in mesmerism, clairvoyance, magic, and occasional diabolic visitations,⁷⁸ in witchcraft,⁷⁹ or in other peculiar ideas,⁸⁰ has in each instance been decided to be insufficient, standing alone, to show insanity or want of testamentary capacity.

§ 347. Effect of Evidence of Eccentricities.

Eccentricity differs from monomania. The former is a conscious aberration and consists of peculiarities which are indulged in in defiance of popular sentiment, whereas monomania is unconscious.⁸¹ As we have before shown, a testator may be competent to make a will and yet not have sufficient mental capacity to properly transact business.⁸² So personal eccentricities and oddities are not, in themselves, proof of such mental disorder or deteriora-

738, 17 Atl. 826; *La Bau v. Vanderbilt*, 3 Redf. Sur. (N. Y.) 384; *Irwin v. Lattin*, 29 S. D. 1, Ann. Cas. 1914C, 1044, 135 N. W. 759; *In re Siebs' Estate*, 70 Wash. 374, Ann. Cas. 1913E, 125, 126 Pac. 912; *In re Smith's Will*, 52 Wis. 543, 38 Am. Rep. 756, 8 N. W. 616, 9 N. W. 665.

Belief in spiritualism is not evidence of an insane delusion.—*Owen v. Crumbaugh*, 228 Ill. 380, 119 Am. St. Rep. 442, 10 Ann. Cas. 606, 81 N. E. 1044.

⁷⁶ *Bonard's Will*, 16 Abb. Pr. N. S. (N. Y.) 128.

⁷⁷ *Addington v. Wilson*, 5 Ind. 137, 61 Am. Dec. 81; *Schild (Schildnecht) v. Rompf*, 9 Ky. Law Rep. 120, 4 S. W. 235; *Thompson v. Quimby*, 2 Bradf. Sur. (N. Y.) 449;

Thompson v. Thompson, 21 Barb. (N. Y.) 107; *Denson v. Beazley*, 34 Tex. 191.

⁷⁸ *Turner v. Hand*, 3 Wall. Jr. (U. S. C. C.) 88, 120, Fed. Cas. No. 14257; *Thompson v. Thompson*, 21 Barb. (N. Y.) 107.

⁷⁹ *Addington v. Wilson*, 5 Ind. 137, 61 Am. Dec. 81; *Schild (Schildnecht) v. Rompf*, 9 Ky. Law Rep. 120, 4 S. W. 235; *Kelly v. Miller*, 39 Miss. 17, 19.

⁸⁰ *Owen v. Crumbaugh*, 228 Ill. 380, 119 Am. St. Rep. 442, 10 Ann. Cas. 606, 81 N. E. 1044; *Thompson v. Thompson*, 21 Barb. (N. Y.) 107.

⁸¹ *Wharton v. Stille's Med. Jur.*, § 29n; *Frere v. Peacocke*, 1 Rob. Ecc. 442. But, see, *Nichols v. Binns*, 1 Sw. & Tr. 239.

⁸² See, ante, § 332.

tion as renders one incompetent of disposing of his estate by will.⁸³ Eccentricities which have no necessary reference to or connection with a testamentary disposition of property, but are such as are often found in those of advanced years, do not prove mental incompetency.⁸⁴ Those eccentricities which do not affect the power of accumulating and disposing of property do not establish testamentary incapacity.⁸⁵ Thus, the fact that the decedent may have been eccentric, erratic, unreasonable, slovenly in dress, and given to peculiarities of speech and manner, is not sufficient to render his will invalid because of lack of capacity.⁸⁶ Herein it must be remembered that we have been dealing with the weight of evidence, which

⁸³ *Austen v. Graham*, 8 Moore P. C. C. 493; *Hutchinson v. Hutchinson*, 152 Ill. 347, 38 N. E. 926; *Bennett v. Hibbert*, 88 Iowa 154, 55 N. W. 93; *Prentis v. Bates*, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153; *Balak v. Susanka*, 182 Mo. App. 458, 168 S. W. 650, 655; *Matter of Lewis*, 33 N. J. Eq. 219; *Lancaster v. Alden*, 26 R. I. 170, 58 Atl. 638.

⁸⁴ *Manatt v. Scott*, 106 Iowa 203, 68 Am. St. Rep. 293, 76 N. W. 717; *Woodville v. Morrill*, 130 Minn. 92, 153 N. W. 131; *Archambault v. Blanchard*, 198 Mo. 384, 95 S. W. 834; *Winn v. Grier*, 217 Mo. 420, 117 S. W. 48; *McClary v. Stull*, 44 Neb. 175, 62 N. W. 501.

⁸⁵ *Converse v. Mix*, 63 Wash. 318, 115 Pac. 305.

Evidence that the testatrix was queer and eccentric and subject to "spells" is insufficient to raise a question for the jury.—In re

Herr's Estate, 251 Pa. St. 223, 96 Atl. 464.

Fretfulness and a suspicious, irritable temper (In re *Blakely's Will*, 48 Wis. 294, 4 N. W. 337), and wilfulness and jealousy (*Coit v. Patchen*, 77 N. Y. 533), have been decided to be insufficient, in themselves, to establish want of testamentary capacity.

⁸⁶ *Church of St. Vincent de Paul v. Branam*, 97 Minn. 349, 107 N. W. 141; *Schleider v. Gergen*, (In re *Latto's Estate*) 129 Minn. 248, 152 N. W. 541; *Hartwell v. McMaster*, 4 Redf. (N. Y.) 389; *Matter of Murphy*, 41 App. Div. 153, 58 N. Y. Supp. 450; In re *Schober's Will*, 90 Misc. Rep. 230, 154 N. Y. Supp. 309, 314; In re *McDermott's Will*, 90 Misc. Rep. 526, 154 N. Y. Supp. 923, 927; *Morgan's Estate*, 219 Pa. St. 355, 68 Atl. 953; In re *Blakely's Will*, 48 Wis. 294, 4 N. W. 337.

does not contemplate that the facts above mentioned may not be introduced in evidence. Although, standing alone, they may not be of sufficient weight to establish testamentary incapacity, yet they may be considered in connection with other matters and in that relation have added importance.⁸⁷ Mental incapacity is indicated by proof of acts, declarations and conduct inconsistent with rationality or with the character and previous habits of the person. Thus a marked change in habits, thoughts and actions is evidence strongly tending to prove mental unsoundness.⁸⁸

§ 348. Deafness, Dumbness, and Blindness.

According to Swinburne, those who were born deaf and dumb could make a will only when they were able by means of writing or signs to make known their desires, and it was further shown that they understood the nature of a testament. If the affliction came later in life a testator might write his will in his own hand, but if he could not write, then the same rule would apply as if he had been born so afflicted.⁸⁹ A blind man could make a nuncupative will by declaring his will before a sufficient number of witnesses, but he could make a testament in writing only when the same was read before witnesses and acknowledged by the testator in their presence to be his last will.⁹⁰

§ 349. The Same Subject.

The early rule was that persons born deaf, dumb and blind, since they always lacked the common inlets of

⁸⁷ *Prentis v. Bates*, 93 Mich. 234,
17 L. R. A. 494, 53 N. W. 153.

⁸⁸ *Balak v. Susanka*, 182 Mo.
App. 458, 168 S. W. 650, 655.

⁸⁹ *Swinburne Wills*, pt. 2, § 10.

⁹⁰ *Swinburne Wills*, pt. 2, § 11.

understanding, were incapable of having *animus testandi*, and could not make a valid will.⁹¹ This rule, however, no longer obtains, modern science and invention having found the means whereby such unfortunates may acquire understanding and may communicate their desires.⁹² The modern rule is that neither blindness,⁹³ nor deafness and dumbness,⁹⁴ nor both the last mentioned in conjunction with blindness,⁹⁵ will alone incapacitate a person to perform the testamentary act. If a person so afflicted has testamentary capacity and can communicate his desires, no reason exists for rejecting his will; the difficulty, however, lies in the proof. One who is deaf and dumb, but whose sight remains and who is able to read and write, may express his wishes in his own handwriting. A blind man may speak and thus express his desires; those who have been born deaf, dumb and blind have been taught to speak and to comprehend expressions

⁹¹ Swinburne, pt. 2, §§ 10, 11; 2 Bl. Com. *497; Brown v. Brown, 3 Conn. 299, 8 Am. Dec. 187; Brower v. Fisher, 4 Johns. Ch. (N. Y.) 441; Weir v. Fitzgerald, 2 Bradf. (N. Y.) 42, 67.

⁹² Barnett v. Barnett, 1 Jones Eq. (N. C.) 221.

⁹³ Mitchell v. Thomas, 6 Moore P. C. C. 137; Longchamp d. Goodfellow v. Fish, 2 Bos. & P. (N. R.) 415; Clifton v. Murray, 7 Ga. 564, 50 Am. Dec. 411; Martin v. Mitchell, 28 Ga. 382; Wilson v. Mitchell, 101 Pa. St. 495; Sharp's Appeal, 134 Pa. St. 492, 19 Atl. 679; Ray v. Hill, 3 Strob. L. (S. C.) 297, 49 Am. Dec. 647; Neil v. Neil, 1 Leigh (Va.) 6.

⁹⁴ Goods of Owston, 2 Sw. & Tr. 461; Goods of Geale, 3 Sw. & Tr. 431; In re Harper, 6 Man. & G. 732; Potts v. House, 6 Ga. 324, 356, 50 Am. Dec. 329; Moore v. Moore, 2 Bradf. Sur. (N. Y.) 261; Brower v. Fisher, 4 Johns. Ch. (N. Y.) 441; Christmas v. Mitchell, 38 N. C. 535.

Compare: Legg v. Myer, 5 Redf. Sur. (N. Y.) 628, as to loss of speech from paralysis.

⁹⁵ Oliver v. Berry, 53 Maine 206, 87 Am. Dec. 547; Weir v. Fitzgerald, 2 Bradf. Sur. (N. Y.) 42; Gombault v. Public Administrator, 4 Bradf. Sur. (N. Y.) 226; Reynolds v. Reynolds, 1 Speers L. (S. C.) 253, 256, 257, 40 Am. Dec. 599.

of others by reading their lips through the sense of touch. Those who are deaf, dumb or blind are not excluded by the statutes regulating wills as are, in various cases, infants, married women, or persons *non compos mentis*, unless they come within the last description; and the fact of the affliction alone does not of itself place them within that class nor raise a presumption of incapacity.⁹⁶ The question to be determined, if mental capacity exists, is whether the person afflicted knew the nature of the act he was performing and expressed his desires so that they were fully understood. There must be satisfactory evidence that the testator knew and approved the contents of the instrument.⁹⁷

⁹⁶ Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Ray v. Hill, 3 Strob. L. (S. C.) 297, 49 Am. Dec. 647.

⁹⁷ In re Axford, 1 Sw. & Tr. 540; Fincham v. Edwards, 3 Curt. 63; Barton v. Robins, 3 Phillim. 455n; Goodfellow v. Fish, 2 Bos. & P. (N. R.) 415; Mitchell v. Thomas, 6 Moore P. C. C. 137; Davis v. Rogers, 1 Houst. (Del.) 44; Clifton v. Murray, 7 Ga. 564, 50 Am. Dec. 411; Martin v. Mitchell, 28 Ga. 382; Wampler v. Wampler, 9 Md. 540; Day v. Day, 3 N. J. Eq. 549; Weir v. Fitzgerald, 2 Bradf. Sur. (N. Y.) 42; Rollwagen v. Rollwagen, 63 N. Y. 504; Lewis v. Lewis, 6 Serg. & R. (Pa.) 489; Harrison v. Rowan, 3 Wash. C. C. 580, 583, Fed. Cas. No. 6141.

Compare: Gerrish v. Nason, 22 Maine 438, 39 Am. Dec. 589; Harding v. Harding, 18 Pa. St. 340; Vernon v. Kirk, 30 Pa. St. 218;

Tomkins v. Tomkins, 1 Bailey L. (S. C.) 92, 19 Am. Dec. 656.

In Goods of Owston, 2 Sw. & Tr. 461, the will of a testator who was deaf and dumb and who could neither read nor write, was rejected because the evidence was not sufficiently satisfactory as to the method in which the instructions of the decedent were given and taken; while in Goods of Geale, 3 Sw. & Tr. 431, the will of a testator afflicted in exactly the same manner was accepted for probate, the various signs made by the decedent to express his wishes being fully stated and explained, there being a rational connection between the meaning and the signs.

The Georgia Code provides that one deaf, dumb and blind may make a will provided the interpreter and scrivener are both attesting witnesses thereto, and are

§ 350. **Excessive Use of Drugs or Intoxicants.**

A person may drink and yet retain his mental faculties; although some may claim they are blurred to an extent, yet the use of intoxicants does not necessarily mean a complete loss of understanding. The same may be said regarding drugs. Yet, without question, a person, through a superabundance of alcoholic drinks or the excessive use of drugs, may become so mentally obscured that he is, for the time being, comparable to a madman. In such a condition he can not make a valid will, for understanding is lacking.⁹⁸ But the effects of alcohol and of drugs wear off, and although they may leave the user weakened both in mind and in body, yet so long as there has not been a destruction of that mentality which the law requires for the making of a will, it can not be said that the fact that the testator is addicted to the habit of drink or of drugs incapacitates him from making a will.⁹⁹ Such

both examined on motion for probate.

⁹⁸ *Billingshurst v. Vickers*, 1 Phillim. 187, 191; *Ayrey v. Hill*, 2 Addams Ecc. 206; *Wheeler v. Alderson*, 3 Hagg. Ecc. 574, 602; *Stedham's Heirs v. Stedham's Ex'r*, 32 Ala. 525; *In re D'Avignon's Will*, 12 Colo. App. 489, 55 Pac. 936; *In re Harper's Will*, 4 Bibb (7 Ky.) 244; *Andress v. Weller*, 3 N. J. Eq. 604, 608; *Black v. Ellis*, 3 Hill's L. (S. C.) 68; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Starrett v. Douglass*, 2 Yeates (Pa.) 46, 48; *Duffield v. Robeson*, 2 Har. (Del.) 375, 383.

"He that is overcome with drink, during the time of his

drunkenness, is compared to a madman, and therefore if he make his testament at that time, it is void in law: which is to be understood when he is so excessively drunk, that he is utterly deprived of the use of reason and understanding. Otherwise, if he be not clean spent, albeit his understanding be obscured, and his memory troubled, yet may he make his testament being in that case."—*Swinb. Wills*, pt. 2, § 6.

⁹⁹ *In re Gharky's Estate*, 57 Cal. 274; *In re Carithers' Estate*, 156 Cal. 422, 105 Pac. 127; *Frost v. Wheeler*, 43 N. J. Eq. 573, 12 Atl. 612; *Bannister v. Jackson*, 45 N. J. Eq. 702, 707, 17 Atl. 692; *Fluck v.*

fact, alone, does not raise a presumption that the necessary intelligence is lacking.¹ The question to be determined is the mental capacity of the testator at the time he makes his will, and the fact that he may then be under the influence of liquor does not invalidate his testament unless he had no intelligent comprehension of what he was doing.² And the effect of the intoxication on his capacity is not a question for experts, but depends upon common observation and the facts of the particular case.³

The continued use of intoxicants and drugs may, however, so deaden the mentality that testamentary capacity is destroyed.⁴ But in such cases it is the lack of the testator's mental capacity that causes his will to be rejected. It is the result which the law contemplates; testamentary capacity is demanded, and a loss of men-

Rea, 51 N. J. Eq. 233, 27 Atl. 636; Koegel v. Egner, 54 N. J. Eq. 623, 35 Atl. 394; In re Mannion's Estate (N. J.), 95 Atl. 988; In re Glockner's Will, 2 N. Y. Supp. 97; Lewis v. Jones, 50 Barb. (N. Y.) 645; Weatherall v. Weatherall, 63 Wash. 526, 115 Pac. 1078.

¹ In re Mannion's Estate (N. J.), 95 Atl. 988.

² In re Carithers' Estate, 156 Cal. 422, 105 Pac. 127; Pierce v. Pierce, 38 Mich. 412; In re Mannion's Estate (N. J.), 95 Atl. 988; Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220; In re Miller's Estate, 179 Pa. St. 645, 39 L. R. A. 220, 36 Atl. 139; In re Tasker's Estate, 205 Pa. St. 455, 55 Atl. 24; Key v. Holloway, 7 Baxt. (66 Tenn.) 575.

³ Ayrey v. Hill, 2 Add. Ecc. 206, 209; Pierce v. Pierce, 38 Mich. 412.

Where a hard drinker, eighty years of age, made a will during his last illness and shortly before his death, the provisions of which were reasonable, and the persons around him before his death believed him to be sane, the validity of the will was upheld.—Stebbins v. Hart, 4 Dem. Sur. (N. Y.) 501.

⁴ United States v. Drew, 5 Mason (U. S. C. C.) 28, Fed. Cas. No. 14993; Duffield v. Robeson, 2 Har. (Del.) 375; Burkhart v. Gladish, 123 Ind. 337, 24 N. E. 118; Howe v. Richards, 112 Iowa 220, 83 N. W. 909; Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220.

tality through drink or drugs is viewed, in the ultimate, the same as insanity produced through any other agency.⁵

§ 351. Apoplectic Seizures and Epileptic Spells.

The fact that the testator had, previously to making his will, suffered from cerebral apoplexy, does not thereby render his testament invalid. Such a seizure, although it deprives the testator of his reason for a time, does not necessarily deprive the victim forever of his capacity to make his will. The effect of the affliction may be such that the sufferer does not recover, or it may be merely temporary. When the issue is testamentary capacity, the material question is the actual effect of the affliction, not what it might have been. It is not a matter of speculation; if the testator was mentally capable when he made his will, apoplectic spells occurring either before or after such time will not invalidate his testament.⁶ The same rule applies regarding epileptic fits.⁷

⁵ *Duffield v. Robeson*, 2 Har. (Del.) 375, 383; *Starrett v. Douglass*, 2 Yeates (Pa.) 46, 48.

⁶ *Matter of Raynor's Will*, 63 Hun 635, 18 N. Y. Supp. 426; *Matter of Iredale*, 53 App. Div. 47, 65 N. Y. Supp. 533; *In re Bennett's Will*, 133 N. Y. Supp. 409; *In re Schmidt's Will*, 139 N. Y. Supp. 464, 482.

In Delafield v. Parish, 25 N. Y. 9, 10, the testator after his stroke was unable to write or articulate and, this being so, the principal beneficiary of the will interpreted the testator's inarticulate sounds to the draftsman of the will, who was a leading chancery lawyer, but employed by her. Three papers

were executed, purporting to be codicils. They were rejected on the ground that testamentary capacity was lacking. *In re Schmidt's Will*, 139 N. Y. Supp. 464, 482, the court says had it been otherwise in the above mentioned case and had the testator been able to speak or articulate the dissenting opinion of Chief Justice Selden would have prevailed.

Proof that the testator had periodical epileptic attacks and convulsions held not to be such evidence of insanity as to raise the presumption of continuance.—*Brown v. Riffin*, 94 Ill. 560.

⁷ *Foot v. Stanton*, 1 Deane 19; *Brown v. Riffin*, 94 Ill. 560; *Wood*

§ 352. Suicide Does Not, of Itself, Establish Mental Incompetency.

The law does not infer insanity either from an attempt to commit suicide, or from the completed act. Proof of an attempt at suicide by the testator, whether before or after making his will, or the consummation of the act thereafter, does not establish unsoundness of mind. Such facts, however, are admissible in evidence, to be considered with other facts from which is to be determined whether the decedent was possessed of testamentary capacity when he executed his will.⁸

§ 353. Unreasonable Prejudices and Animosities.

Perverse opinions and unreasonable prejudices are not to be confounded with mental alienation.⁹ "Many a man has some hobby, and may ride it very much to the annoyance of others, and yet be perfectly capable of managing his own affairs, and disposing of his property by deed

v. Carpenter, 166 Mo. 465, 66 S. W. 172; In re Lewis' Will, 51 Wis. 101, 7 N. W. 829.

⁸ Burrows v. Burrows, 1 Hagg. Ecc. 109; In re Chevallier's Estate, 159 Cal. 161, 113 Pac. 130; Duffield v. Robeson, 2 Har. (Del.) 375; In re Miller's Will, 3 Boyce (Del.) 447, 85 Atl. 803, 810; Wilkinson v. Service, 249 Ill. 146, Ann. Cas. 1912A, 41, 94 N. E. 50; McElwee v. Ferguson, 43 Md. 479; Brooks v. Barrett, 7 Pick. (Mass.) 94; Holton v. Cochran, 208 Mo. 314, 106 S. W. 1035.

In a case in which the testator was subject to epileptic attacks, but was of sound mind and dis-

posing memory at the time of making the will, although he committed suicide five days after, it was sustained as a valid will.—Godden v. Burke's Exrs., 35 La. Ann. 160, two judges dissenting.

Where the facts show that the will was made in contemplation of suicide and its terms disclose that it is the product of a mind so shattered as to lack testamentary capacity, the instrument should be rejected.—Johnson v. Stancelle, 94 Miss. 923, 48 So. 619.

⁹ Phillips v. Chater, 1 Demarest (N. Y.) 533; American Seaman's Friend Society v. Hopper, 33 N. Y. 619.

or will.'"¹⁰ Prejudice, however strong and unjust, is not equivalent to insanity.¹¹ Whether well founded or not, prejudices and animosities do not, as a matter of law, invalidate the testator's will, but can have that effect only when clearly the result of a derangement of mind,¹² or unless their existence has been used to impose a fraud on the testator.¹³

Violent and groundless prejudices against the natural objects of affection, which influence the dispositions of a will, are not necessarily evidence of insane delusions, but taken in connection with other facts have a strong tendency to show such a condition of mind.¹⁴ But insanity is not to be inferred from the fact of aversion to a wife, with whom the testator had never lived in harmony.¹⁵ And the mere fact that a testator disinherits a child is no evidence that he was insane or entertained delusions respecting his child.¹⁶ Nor did giving the bulk

¹⁰ *Turner v. Hand*, 3 Wall. Jr. (U. S. C. C.) 88, 120 Fed. Cas. No. 14257.

Compare: *Frere v. Peacocke*, 1 Rob. Ecc. 442; *Nichols v. Binns*, 1 Sw. & Tr. 239.

¹¹ *Trumbull v. Gibbons*, 22 N. J. L. 117; *Phillips v. Chater*, 1 Demarest (N. Y.) 533.

Compare: *Shorb v. Brubaker*, 94 Ind. 165.

¹² *Nicewander v. Nicewander*, 151 Ill. 156, 37 N. E. 698; *Abrahams v. Woolley*, 243 Ill. 365, 90 N. E. 667; *Collins v. Brazill*, 63 Iowa 432, 19 N. W. 338; *Gesell v. Baugher*, 100 Md. 677, 60 Atl. 481; *Woodville v. Morrill*, 130 Minn. 92, 153 N. W. 131.

¹³ *Carter v. Dixon*, 69 Ga. 82.

¹⁴ *Dew v. Clark*, 3 Addams Ecc. 79; *Boughton v. Knight*, L. R. 3 P. & D. 64; *Florey v. Florey*, 24 Ala. 241; *Cotton v. Ulmer*, 45 Ala. 378, 6 Am. Rep. 703; *Lucas v. Parsons*, 24 Ga. 640, 71 Am. Dec. 147; *Evans v. Arnold*, 52 Ga. 169; *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171; *Stackhouse v. Horton*, 15 N. J. Eq. 202; *Stanton v. Wetherwax*, 16 Barb. (N. Y.) 259; *Coit v. Patchen*, 77 N. Y. 533; *Jenckes v. Smithfield*, 2 R. I. 255; *Nicholas v. Kershner*, 20 W. Va. 251; *Cole's Will*, 49 Wis. 179, 5 N. W. 346.

¹⁵ *Phillips v. Chater*, 1 Demarest (N. Y.) 533.

¹⁶ *Bomgardner v. Andrews*, 55 Iowa 638, 8 N. W. 481.

of an estate to reduce the national debt indicate testamentary incapacity in one who had no legitimate kindred who were thereby disappointed.¹⁷

**§ 354. Wills Containing Harsh and Unreasonable Provisions:
Do Not Establish Incapacity.**

Where the provisions of a will dispose of a decedent's estate in accord with the dictates of natural justice, strong evidence will be required to show a lack of testamentary capacity.¹⁸ But harsh provisions do not render a will invalid. Where testamentary capacity is the issue, the reasonableness of the terms of the will does not control. If it is established that the testator lacked sufficient understanding when he executed his will, the instrument will be declared invalid, no matter how natural and just its provisions may seem. The vice of a will of a testator mentally deficient lies not in the character of its dispositions, and is not affected by the consideration that its provisions would have been the same had capacity existed.¹⁹ An instrument can not be a will unless, among other things, it is the lawful intent of a competent person, and one who is mentally incompetent is legally incapable of forming and expressing such an intent. Where there is no mind, such as the law requires, there can be no will. A will is the child of the mind, but when the mind is dead, there can be no offspring.

¹⁷ *In re Lewis*, 33 N. J. Eq. 219.

¹⁸ *Gunderson v. Rogers*, (*Gunderson's Estate*) 160 Wis. 468, 152 N. W. 157.

See, this chapter, note 42, regarding a rational act rationally done.

¹⁹ *Shirley v. Ezell*, 180 Ala. 352, 60 So. 905, 907.

The fact that a white testator disinherited his heirs and left his entire estate to a negro held not sufficient to cause his will to be rejected.—*Leach v. Burr*, 188 U. S. 510, 47 L. Ed. 567.

§ 355. The Same Subject: How Considered.

The rule is that a testator has the right to make a harsh, unjust, unreasonable, or even a cruel will; he may disinherit his only child and leave his property to other heirs or to strangers. Such facts, in themselves, do not constitute legal grounds for holding that the testator was mentally incompetent.²⁰ Yet, in determining the

²⁰ *Field v. Shorb*, 99 Cal. 661, 34 Pac. 504; *In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172, 711; *In re Martin's Estate*, 170 Cal. 657, 151 Pac. 138; *Penn v. Thurman*, 144 Ga. 67, 86 S. E. 233; *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Allen v. North*, 271 Ill. 190, 110 N. E. 1027; *Breadheft v. Cleveland*, 184 Ind. 130, 108 N. E. 5, 110 N. E. 662; *Philpott v. Jones*, 164 Iowa 730, 146 N. W. 859, 862; *Byrne v. Byrne (Mo.)*, 181 S. W. 391; *Frowert's Estate*, 11 Phila. (Pa.) 136; *Carr v. McCormick (R. I.)*, 96 Atl. 817.

In *Boughton and Marston v. Knight*, L. R. 3 P. & D. 64, the court says: "For convenience the phrase 'sound mind' may be adopted. . . . I must commence, however, by telling you what these words do not mean. They do not mean a perfectly balanced mind. If so, which of us would be competent to make a will? Such a mind would be free from all influence of prejudice, passion and pride. But the law does not say that a man is incapacitated from making a will if he proposes to

make a disposition of his property moved by capricious, frivolous, mean or even bad motives. We do not sit here to correct injustice in that respect. Our duty is limited to this: to take care that that, and that only, which is the true expression of a man's real mind, shall have effect given to it as his will. In fact, this question of justice and fairness in the making of wills in a vast majority of cases depends upon such nice and fine distinctions that we can not form, or even fancy that we can form, a just estimate of them. Accordingly, by the law of England, every one is left free to choose the person upon whom he will bestow his property after death, entirely unfettered in the selection he may think proper to make. He may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued." (Note.) In the United States, the statutes of the various states gen-

ultimate question of the testamentary capacity of the testator, the jury has the right to consider any evidence showing that the will was just or unjust, reasonable or unreasonable, natural or unnatural. It may also consider evidence as to the value of the decedent's estate and the financial condition of those who might naturally expect to be beneficiaries, at the time the will was made. Such matters, although not in themselves establishing testamentary incapacity, may be considered and have weight, according to circumstances and in connection with other evidence, in determining the question of capacity.²¹

erally limit the amount which may be given to charity.

The mere fact that the testator disinherits his only child, does not raise any presumption of want of testamentary capacity.—*Breadheft v. Cleveland*, 184 Ind. 130, 108 N. E. 5, 110 N. E. 662.

²¹ *Field v. Shorb*, 99 Cal. 661, 34 Pac. 504; *In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172, 711; *In re Martin's Estate*, 170 Cal. 657, 151 Pac. 138; *Whiddon v. Salter*, 144 Ga. 67, 86 S. E. 243; *Dillman v. McDanel*, 222 Ill. 276, 113 Am. St. Rep. 400, 78 N. E. 591; *Healea v. Keenan*, 244 Ill. 484, 91 N. E. 646; *Beemer v. Beemer*, 252 Ill. 452, 96 N. E. 1058; *Kern v. Meyer*, 264 Ill. 560, 106 N. E. 429, 430; *Manatt v. Scott*, 106 Iowa 203, 216, 68 Am. St. Rep. 293, 76 N. W. 717; *Trotter v. Trotter*, 117 Iowa 417, 418, 90 N. W. 750; *Arnold v. Livingstone*, 155 Iowa 601, 134 N. W. 101; *Philpott v. Jones*, 164 Iowa

730, 146 N. W. 859, 862; *In re Dobal's Estate*, (Iowa) 157 N. W. 169; *Mowry v. Norman*, 223 Mo. 463, 122 S. W. 724; *Byrne v. Byrne*, (Mo.) 181 S. W. 397; *In re Williams' Estate*, 52 Mont. 192, 156 Pac. 1087; *In re Esterbrook's Will*, 83 Vt. 229, 75 Atl. 1.

On the issue of testamentary capacity, the unreasonableness or unjustness of the provisions of a testator's will may be considered in connection with other circumstances, but do not alone establish incapacity.—*Morgan v. Morgan*, 30 App. D. C. 436; *Taylor v. McClinck*, 87 Ark. 243, 112 S. W. 405; *Donnan v. Donnan*, 236 Ill. 341, 86 N. E. 279. But if the issue is only an insane delusion, such evidence would be admissible only, after the delusion had been established, to show that the testator had been governed by it.—*Taylor v. McClinck*, 87 Ark. 243, 112 S. W. 405.

By the words "natural objects

of the testator's bounty" is not meant the legal object recognized by the law of descent, for the power and purpose to disregard some canon of descent are necessarily implied in the making of any will. The jury is to determine not what the testator would have probably done if governed by fixed canons of descent, or any law of human contrivance, but what he might under all the evidence have reasonably been expected to have

done when subject to no influences, except that of nature, with its own rule of duty and justice. If the jury finds that the testator has selected objects of his bounty differing from those designated by natural laws, such fact involving unnatural conduct may be considered by the jury in connection with other evidence in determining the testator's sanity.—*Breadheft v. Cleveland*, 184 Ind. 130, 108 N. E. 5, 110 N. E. 662.

CHAPTER XV.

RULES OF EVIDENCE REGARDING TESTAMENTARY CAPACITY.

- § 356. Evidence admitted of occurrences both prior and subsequent to the making of the will.
- § 357. Effect of proof of insanity, chronic or temporary.
- § 358. Evidence of testator's mental condition, acts and habits, before and after execution of his will, admissible.
- § 359. Oral and written declarations: Difference in effect.
- § 360. Declarations of the testator: For what purposes admitted.
- § 361. Declarations of the testator as affecting the issue of testamentary capacity.
- § 362. Declarations of testator admitted to show state of mind, not as proof of facts stated.
- § 363. Deeds, letters, prior wills, and the like: How considered.
- § 364. Proof of insanity of blood kindred.
- § 365. Manner in which testator was treated by his family.
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- § 367. Admissions against his interest by one of several beneficiaries.
- § 368. The same subject: A middle ground.
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- § 370. The same subject.
- § 371. Declarations of subscribing witnesses.
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- § 377. Who are medical experts.
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- § 381. Subscribing witnesses should state facts so that value of opinions may be judged.
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- § 386. The same subject: Opinion must be based on facts given in evidence by witness.
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- § 389. Trial court must determine qualifications of witness to express an opinion.
- § 390. Privileged communications: Waived as to subscribing witnesses.
- § 391. The same subject: Who may claim or waive the privilege.
- § 392. The same subject: Contest between heirs and next of kin.
- § 393. The same subject: Claiming privilege is not suppression of evidence.
- § 394. Burden of proof: Term defined.
- § 395. The term "burden of proof" as it has been applied in will contests.
- § 396. All persons are presumed of sound mind, in absence of evidence to the contrary.
- § 397. Presumptions and suspicious circumstances.

- § 398. Distinction where will is prepared by testator, or under supervision of principal beneficiary.
- § 399. Proponent should establish his *prima facie* case by proof of testamentary capacity: Conflict of authority.
- § 400. The same subject: Weight of authority.
- § 401. Burden of proof after proponent has established a *prima facie* case.
- § 402. Burden of proof: The better rule.
- § 403. Testamentary capacity is a question of fact.

§ 356. Evidence Admitted of Occurrences Both Prior and Subsequent to the Making of the Will.

Although the question as to the mental competency of a testator is to be decided by the state of his mind at the time the will was made, evidence is always admissible of prior and subsequent occurrences which tend to shed light on the matter. Cases involving the admissibility of testimony to establish or rebut an allegation of testamentary incapacity may be ordinarily classified under general rules of the law of evidence, of which it is not necessary here to give detailed illustration. But the issue being a broad one, much latitude is allowed, and it has even been said that all the facts of the testator's personal history and of his parents and remoter ancestors may be admitted in evidence.¹

§ 357. Effect of Proof of Insanity, Chronic or Temporary.

When testamentary capacity is the issue, because the mental competency of the testator at a particular time

¹ Coughlin v. Poulson, 2 MacArthur (9 D. C.) 308; Ross v. McQuiston, 45 Iowa 145; Baxter v. Abbott, 7 Gray (Mass.) 71.

See, post, § 364, as to proof of insanity of blood kindred.

If there is evidence tending to show mental unsoundness, it is competent to show the insanity of a testator's collateral blood relations no further removed than uncles and aunts, without making

must be determined, it does not follow that there must be direct and positive proof of incapacity at that very moment. Proof of insanity or mental incapacity chronic in its nature, especially where it is progressive, raises the presumption of continuance; and where proof of such habitual insanity at a time prior to the making of the will has been put in evidence, it is incumbent on the proponent to rebut the same.² But it is not a positive rule that the testator was mentally incompetent when he executed his will merely because incapacity is shown to have existed either before or after that time, since it might have been the result of some temporary cause.³

§ 358. Evidence of Testator's Mental Condition, Acts and Habits, Before and After Execution of His Will, Admissible.

On the issue of testamentary capacity, the evidence should be permitted to take a wide range in order that all facts may be brought out which will assist in determining the question.⁴ Evidence of the testator's mental condition, his acts, conduct and habits, both before and after the execution of the will, are admissible, but only for the

proof that it was hereditary in character.—*Martin v. Beatty*, 254 Ill. 615, 98 N. E. 996, 997.

² *Balak v. Susanka*, 182 Mo. App. 458, 168 S. W. 650, 656.

See, ante, §§ 333, 334, 336, as to the presumption of the continuance of chronic insanity.

³ *Harris v. Hipsley*, 122 Md. 418, 89 Atl. 852.

See, ante, § 333, as to no presumption that the insanity continues when it is the result of a

temporary attack, such as fever, injury, or the like.

See, ante, §§ 337, 338, as to lucid intervals.

⁴ *McConnell's Exr. v. McConnell*, 138 Ky. 783, 129 S. W. 106; *Lisle v. Couchman*, 146 Ky. 345, 142 S. W. 1023; *Bramel's Exr. v. Crain's Guardian*, 157 Ky. 671, 163 S. W. 1125, 1127; *In re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *McAllister v. Rowland* (*In re Bullard's Estate*), 124

purpose of shedding light on the actual condition of his mind at the time of the execution of the will.⁵ Such testimony, however, must be accepted with caution, since evidence of the acts and conduct of the testator at other times may produce a false impression in the minds of the jurors, and there is grave danger of it having more weight than the law contemplates it should have in determining the mental condition of the testator when he made his will. It is therefore of great importance, when such testimony is offered, that the time be shown as clearly as is possible.⁶ And before such evidence is admitted, there should be some proof warranting the presumption that the mental condition of the testator at the time referred to in the evidence was the same as when he made his will.⁷ A person theretofore competent might rave because of illness, or become mentally unbalanced because of injury, either of which occurring after his will was made would in nowise tend to establish testamentary incapacity.

Minn. 27, Ann. Cas. 1915B, 1006, 144 N. W. 412, 413.

⁵ *Rodney v. Burton*, 4 *Boyce* (27 Del.) 171, 86 Atl. 826; *Voodry v. Trustees*, 251 Ill. 48, 95 N. E. 1034; *Kellan v. Kellan*, 258 Ill. 256, 101 N. E. 614; *Wisner v. Chandler*, 95 Kan. 36, 147 Pac. 849; *Harris v. Hipsley*, 122 Md. 418, 89 Atl. 852; *Lyon v. Townsend*, 124 Md. 163, 91 Atl. 704; *Collins v. Dowlan*, 118 Minn. 214, 136 N. W. 854; *Chrisman v. Chrisman*, 16 Ore. 127, 18 Pac. 6; *Carnagle v. Diven*, 31 Ore. 366, 49 Pac. 891; *In re Pickett's Will*, 49 Ore. 127, 89 Pac. 377.

In re Buck v. St. Louis Union Trust Co., 267 Mo. 644, 185 S. W. 208, it was held that an offer to prove that the business of a manufacturing company, of which the testator was the manager during the time the will was made, was so systematized that it required no ability on the part of the testator to manage the same, would be properly refused as having no probative force upon the question of incapacity to make the will.

⁶ *Harris v. Hipsley*, 122 Md. 418, 89 Atl. 852.

⁷ *Leffingwell v. Bettinghouse*, 151 Mich. 513, 115 N. W. 731.

§ 359. Oral and Written Declarations: Difference in Effect.

A declaration is merely a statement of some alleged fact, idea or application which may be true or untrue, and the declarant may believe the statement, or it may be wilfully false. Such declarations may be either oral or in writing. Oral declarations are not entitled to be given the same weight as those which are written. There is difficulty in even transposing any speech from direct to indirect discourse. Witnesses nearly always, in repeating statements of others, convert them into language of their own. The sense of an oral declaration may be unintentionally perverted; an ignorant witness may be incapable of repeating in such words as are comprised in his vocabulary, remarks into which were interpolated legal or technical terms or unfamiliar phrases. The imagination of an uninterested witness must be considered; and where the witness is biased, prejudiced, or actuated by self interest and hope of gain, his testimony regarding oral declarations of a decedent should be received with caution.⁸

§ 360. Declarations of the Testator: For What Purposes Admitted.

Declarations of a testator may be offered in evidence for various purposes, and the purpose will control their admissibility. The object for which such testimony is offered should be kept in mind, and the failure of many decisions to clearly state the reason for accepting or rejecting such evidence has led to difficulties. Declarations may be offered (1) to show the revocation of a will admitted to have once been valid, (2) to impeach the

⁸ In *re Campbell's Will*, 136 N. Y. Supp. 1086, 1098.

See, *ante*, § 136, as to viewing such evidence with distrust.

validity of a will because of mistake, fraud, duress, or some other cause not involving the mental capacity of the testator, (3) or to prove the lack of testamentary capacity, or that the will was obtained by undue influence. Where the purpose for which the declarations of a testator are offered is to establish a fact referred to in the two classes first above mentioned, the general rule is that such declarations are inadmissible unless made at or so near the time of the execution or alleged revocation of the will as to be a part of the *res gestæ*.⁹ If not a part of the *res gestæ*, they are mere hearsay statements and are not admissible to control the construction of the instrument or to support or destroy its validity.¹⁰

§ 361. Declarations of the Testator as Affecting the Issue of Testamentary Capacity.

When the issue is the testamentary capacity of the testator or that the will was obtained by undue influence,

⁹ *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71.

¹⁰ *Stevens v. Van Cleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13412; *Jackson v. Kniffen*, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390; *Moritz v. Brough*, 16 Serg. & R. (Pa.) 403.

Declarations which are a part of the *res gestæ* are admissible on the question of intent to revoke.—*Patterson v. Hickey*, 32 Ga. 156; *Gay v. Gay*, 60 Iowa 415, 46 Am. Rep. 78, 14 N. W. 238; *Townshend v. Howard*, 86 Me. 285, 29 Atl. 1077.

In the absence of evidence sufficient to raise a presumption of revocation of his will by the tes-

tator, revocation can not be presumed from his declarations which are not part of the *res gestæ*.—*Throckmorton v. Holt*, 180 U. S. 552, 45 L. Ed. 663, 21 Sup. Ct. 474.

See, ante, § 53, as to parol declarations as part of the *res gestæ*.

See, ante, § 112, as to the effect of evidence of parol declarations or of the conduct of the testator, with reference to conditional wills.

See, ante, §§ 124, 125, 126, as to the extent to which parol declarations may be admitted regarding revocation of duplicate wills.

See, ante, §§ 208-212, as to the effect of declarations in connection with donations mortis causa.

the rule differs.¹¹ Undue influence is associated with testamentary capacity since the amount of influence necessary to affect the testator varies according to the strength of his mind. Upon such issues, declarations of the testator, either before or after the execution of the will, may be admitted in evidence. The question to be decided is the mental competency of the testator when he made his will. If at such time he possessed the required mental capacity, the will is not invalidated because he may have been incompetent either before or after that date. But the law permits evidence of prior or subsequent incapacity if it sheds light upon the mental condition of the testator at the time the will was made. If it does not bear upon such period, it amounts to nothing.

Declarations of a testator are the external manifestations of his mind; mental disturbances are manifested by declarations as surely as by conduct. Their probative force, however, depends on their nearness or remoteness to the time of the execution of the will, and they may be so far removed as to be entitled to no force whatsoever.¹²

¹¹ See, ante, § 360.

As to mental capacity affecting the question of undue influence, see, post, § 369.

¹² *Stevens v. Van Cleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13412; *Mason v. Bowen*, 122 Ark. 407, 183 S. W. 973; *Bever v. Spangler*, 93 Iowa 576, 603, 61 N. W. 1072; *Reel's Exrs. v. Reel*, 1 Hawks (8 N. C.) 248, 9 Am. Dec. 632; *Rambler v. Tryon*, 7 Serg. & R. (Pa.) 90, 10 Am. Dec. 444; *McTaggart v. Thompson*, 14 Pa. St. 149.

In *Shailer v. Bumstead*, 99 Mass.

112, the court says: "It (the will) is always liable to be impeached by any competent evidence that it was never executed with the required formality, was not the act of one possessed of the required testamentary capacity, or was obtained by such fraud or undue influence as to subvert the real intentions and will of the maker. The declarations of the testator accompanying the act must always be resorted to as the most satisfactory evidence to sustain or defend the will whenever this issue is presented."

There is no fixed rule as to the lapse of time between the declaration and the making of the will which is necessary to render evidence of the former inadmissible, but it must rest in the sound discretion of the court, and will vary according to the circumstances.¹³

§ 362. Declarations of Testator Admitted to Show State of Mind, Not as Proof of Facts Stated.

In a contest involving testamentary capacity, proof of declarations of the testator, either written or oral, made either before or after the execution of the will, are not admissible as proof of the facts stated,¹⁴ but are permitted for the purpose of showing the state of the testator's mind when the will was made.¹⁵ While not admitted to establish a fact, yet such declarations may show that the

¹³ *Huffman v. Graves*, 245 Ill. 440, 92 N. E. 289; *In re Winch's Estate*, 84 Neb. 251, 18 Ann. Cas. 903, 121 N. W. 116. See, also, *In re Walker's Will*, 152 Iowa 154, 128 N. W. 386, where four or five years was not too remote; *Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984, where fifteen or twenty years was too remote; and *Hardy v. Martin*, 200 Mass. 548, 86 N. E. 939, where the question of congenital insanity was involved and testimony as to the conduct of the testator was limited to six years prior to the will.

¹⁴ *Throckmorton v. Holt*, 180 U. S. 552, 572, 45 L. Ed. 663, 21 Sup. Ct. 474; *Mason v. Bowen*, 122 Ark. 407, 183 S. W. 973; *Comstock v. Hadlyme Ecclesiastical Soc.*, 8 Conn. 254, 20 Am. Dec. 100;

Reynolds v. Adams, 90 Ill. 134, 32 Am. Rep. 15; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056; *Hill v. Bahrns*, 158 Ill. 314, 41 N. E. 912; *England v. Fawbush*, 204 Ill. 384, 68 N. E. 526; *Norton v. Clark*, 253 Ill. 557, 97 N. E. 1079; *Jones v. McLellan*, 76 Me. 49; *In re Campbell's Will*, 136 N. Y. Supp. 1086, 1098; *Robinson v. Hutchinson*, 26 Vt. 38, 60 Am. Dec. 298.

A testator's declaration that he did not make the will, and that others made him drunk to procure him to execute it, is inadmissible. — *Gibson v. Gibson*, 24 Mo. 227.

¹⁵ *Throckmorton v. Holt*, 180 U. S. 552, 572, 45 L. Ed. 663, 21 Sup. Ct. 474; *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459; *Mason v.*

testator had knowledge of some fact material in the case and otherwise proven, and are properly admissible for such purpose.¹⁶ And where untrue declarations of the testator have been put in evidence, it is proper in rebuttal to show the truth of the situation.¹⁷

§ 363. Deeds, Letters, Prior Wills, and the Like: How Considered.

Where a will does not conform to the previously expressed intentions of the testator, proof of such statements will not, of itself, invalidate the will or establish testamentary incapacity, since one is not to be declared

Bowen, 122 Ark. 407, 183 S. W. 973; Burnham v. Grant (In re Burnham's Will), 24 Colo. App. 131, 134 Pac. 254; Comstock v. Hadlyme Ecclesiastical Soc., 8 Conn. 254, 20 Am. Dec. 100; Dennis v. Weekes, 51 Ga. 24; Reynolds v. Adams, 90 Ill. 134, 32 Am. Rep. 15; Hill v. Bahrns, 158 Ill. 314, 41 N. E. 912; Waugh v. Moan, 200 Ill. 298, 65 N. E. 713; England v. Fawbush, 204 Ill. 384, 68 N. E. 526; Wilkinson v. Service, 249 Ill. 146, Ann. Cas. 1912A, 41, 94 N. E. 50; Norton v. Clark, 253 Ill. 557, 97 N. E. 1079; Kellan v. Kellan, 258 Ill. 256, 101 N. E. 614; Holliday v. Shepherd, 269 Ill. 429, 109 N. E. 976; Bower v. Bower, 142 Ind. 194, 41 N. E. 523; Wendt v. Foss, 161 Iowa 122, 140 N. W. 881; May v. Bradlee, 127 Mass. 414; Rule v. Maupin, 84 Mo. 587; Thompson v. Ish, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510; Pattee v. Whitcomb, 72 N. H. 249,

56 Atl. 459; In re Crumb's Estate, 127 N. Y. Supp. 269; In re Benjamin's Will, 136 N. Y. Supp. 1070; In re Campbell's Will, 136 N. Y. Supp. 1086; Gick v. Stumpf, 204 N. Y. 413, 97 N. E. 865; Wood v. Sawyer, 61 N. C. 251; Foster's Exrs. v. Dickerson, 64 Vt. 233, 24 Atl. 253.

Declaration by the testator as to indulgence in immoral practices held inadmissible.—Snell v. Weldon, 239 Ill. 279, 87 N. E. 1022.

¹⁶ Foster's Exrs. v. Dickerson, 64 Vt. 233, 24 Atl. 253.

¹⁷ Where evidence is introduced of the testator's declaration that his son would use up all his estate, it is proper to introduce evidence in rebuttal that the son had received nothing for caring for the property of his father.—In re Walker's Will, 152 Iowa 154, 128 N. W. 386.

Where evidence is introduced showing that the testator had

incompetent merely because he changed his mind; but such testimony is admissible and may be considered with other evidence on the issue of mental competency.¹⁸ A prior will of the testator, which is conceded to have been executed at a time when he was of sound mind, may be admitted in evidence for the purpose of comparison with a later will, in order to show testamentary capacity,¹⁹ the state of his affections,²⁰ or that the disposition which he made of his estate was or was not in accord with his previously expressed intentions.²¹ Deeds executed by the testator may be admitted as evidence of mental capacity and the method of and nature of his business transactions.²² Letters written by the testator, if not too remote, whether before or after the execution of his will, may be considered, not only for the expressions of thought therein contained as showing the state of his mind at that time, but also as to the manner of writing and the spelling of the decedent's name.²³ Clear, sensible, and perfectly coherent letters upon business and other matters, written within the year, but as long as two months before the

made untrue declarations to the effect that he was divorced from his wife, an agreement between himself and his wife as to property and contractual rights is admissible to explain his statements.—*Turner v. American Security & Trust Co.*, 213 U. S. 257, 53 L. Ed. 788, 29 Sup. Ct. 420.

¹⁸ *Hurley v. Caldwell*, 244 Ill. 448, 91 N. E. 654. See, also, *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523.

¹⁹ *Horner v. Buckingham*, 103 Md. 556, 64 Atl. 41; *Whisner v. Whisner*, 122 Md. 195, 89 Atl. 393.

²⁰ *Rule v. Maupin*, 84 Mo. 587; *Lindsey v. Stephens*, 229 Mo. 600, 129 S. W. 641.

²¹ *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Nieman v. Schnitker*, 181 Ill. 400, 55 N. E. 151; *Powers' Exr. v. Powers*, 21 Ky. Law Rep 597, 52 S. W. 845; *In re Livingston's Will*, (N. J.) 37 Atl. 770; *Brown v. Mitchell*, 87 Tex. 140, 26 S. W. 1059.

²² *Wilson v. Wilson*, 7 Ohio N. P. (N. S.) 435.

²³ *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682.

making of the will, are entitled to considerable weight.²⁴ But letters addressed to the testator are not admissible in evidence as proof of his mental condition unless they are connected with and explain some act of his in reference to his will, and unless he exercised some act of judgment or understanding in connection with them.²⁵

§ 364. Proof of Insanity of Blood Kindred.

There is a distinction between the inferences to be drawn from the proof of habitual or chronic insanity and from that which is merely temporary.²⁶ The nature of the affliction controls to a large extent the evidence which may be introduced. It is established in medical science that in cases of chronic insanity an hereditary predisposition is often found. It is therefore material in proving habitual insanity to introduce evidence showing that the ancestors or blood relatives of the testator were similarly afflicted.²⁷ Such evidence is admissible, however, only in connection with insanity which may be inherited. Although an immediate ancestor of the testator might have

²⁴ In re Blakely's Will, 48 Wis. 294, 4 N. W. 337.

²⁵ Snell v. Weldon, 239 Ill. 279, 87 N. E. 1022; Waters v. Waters, 35 Md. 531.

The same rule has been applied to letters found in an envelope among the possessions of the testator after his death and marked "spirit communications."—Crumbaugh v. Owen, 238 Ill. 497, 87 N. E. 312.

²⁶ See, ante, §§ 333, 334.

²⁷ Rex v. Tuckett, 1 Cox C. C. 103; People v. Smith, 31 Cal. 466; Coughlin v. Poulson, 2 MacArthur

(9 D. C.) 308; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Berry v. Safe Deposit etc. Co., 96 Md. 45, 53 Atl. 720; Baxter v. Abbott, 7 Gray (Mass.) 71; Prentiss v. Bates, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153.

In Scotland, evidence that a maternal aunt had been afflicted with insanity was held admissible.—In re Gibson's Case, 2 Broun (Scot. Just.) 322, 347. Yet in another case the fact that a paternal uncle had died insane was held inadmissible in evidence.—Lord Advocate v. Brown, 2 Irvine (Scot.

been during his lifetime confined to an asylum, if his insanity was merely the result of some temporary cause, such as stimulants, drugs or injuries, evidence of the insanity of such ancestor would be inadmissible.²⁸ The weight of the evidence would depend upon the nearness of the blood relationship and the number of those in like relationship as that of the testator who had been affected, and before such evidence is admissible there must be a showing that the testator had suffered to some extent from a like affliction. If the only proof is that his mind was unbalanced from some temporary cause, proof of the insanity of his ancestors should not be received.²⁹ Insanity, either of an ancestor or of the testator, must be proved as a fact; it can not be established by reputation or by hearsay testimony.³⁰

§ 365. Manner in Which Testator Was Treated by His Family.

Where relatives are contesting the will on the ground of insanity, evidence that they made no effort during the testator's lifetime to have him adjudged insane, is admissible.³¹ The manner in which such a testator was treated by his family is not in itself competent substantive evidence tending to prove either sanity or insanity,

Just.) 154. See, also, *Malcolm McLeod's Case*, 2 Swin. (Scot. Just.) 88.

²⁸ *Reichenbach v. Ruddach*, 127 Pa. St. 564, 18 Atl. 432; *Titus v. Gage*, 70 Vt. 13, 39 Atl. 246.

²⁹ *Pringle v. Burroughs*, 100 App. Div. (N. Y.) 366, 91 N. Y. Supp. 750.

³⁰ *Wright v. Tatham*, 5 Cl. & Fin. 670; *Foster v. Brooks*, 6 Ga. 287, 292; *Ashcraft v. De Armond*,

44 Iowa 229; *Townsend v. Pepperell*, 99 Mass. 40.

In *Owen v. Groves*, 145 Ga. 287, 88 S. E. 964, it was held that an offer to prove that, according to general repute in the family, a brother of the testatrix became insane before he died, was properly rejected upon the question of testamentary capacity, the evidence being hearsay.

³¹ *Irwin v. West*, 81 Pa. St. 157.

it being at the most merely an extrajudicial expression of opinion. It is, however, proper evidence to be considered in connection with the circumstances of the case; and likewise, the acquiescence of the testator in the conduct of his family toward him, especially in a case where their manner of treatment is such that it would not be tolerated by a person of sound mind, is admissible as tending to show incompetency.³²

**§ 366. Interests of Beneficiaries Under a Will Are Not Joint:
Effect as to Declarations Being Admitted in Evidence.**

Extrajudicial statements of third parties, not a part of the *res gestæ*, are generally excluded on the ground of hearsay. One well recognized exception to this rule is presented where the declarations are against interest. As a general rule, the admissions of a party to the record against his interest are competent against him, and this rule applies to cases where others have a joint interest in the suit, although such other parties in interest may be injuriously affected. The rule does not apply, however, where the interests are not joint, a mere community of interest is not sufficient.

³² In *re De Laveaga's Estate*, 165 Cal. 607, 133 Pac. 307, 314.

"The inquiry is of course directed to the condition at the date of the execution of the will, but the entire moral and intellectual development of the testator at that time is more or less involved; not alone those substantive and inherent qualities which enter into the constitution of the man, but those less permanent features which may be said to

belong to and spring from the affections and emotions, as well as those morbid developments which have their origin in some physical disturbance. All that is peculiar in temperament or modes of thought, the idiosyncrasies of the man, so far as susceptibility is thereby shown, present proper considerations for the jury." — *Shailer v. Bumstead*, 99 Mass. 112, 121, 122.

When a will is offered for probate, all legatees and devisees have an interest in the result; they have a community interest in sustaining the instrument, but their interests are separate and distinct.³³

§ 367. Admissions Against His Interest by One of Several Beneficiaries.

A statement by one of several legatees that the testator had been of unsound mind when he made his will, or that he had unduly influenced the decedent in the manner of the disposition of his estate, is an admission against his interest. It is claimed in some decisions that it would be unreasonable to allow the declarant to escape the effect of such an admission although it would be equally conclusive against the interests of his co-legatees. Therefore, in some cases, it has been held more consistent to admit evidence of such an admission by one of the legatees, not as an admission by the other parties in interest, but as a circumstance that a party interested had admitted a fact which he would not have admitted had he not believed it to be true. The effect, in such a case, although the admission is not entitled to be weighed against all those in interest, is that such evidence tends to the presumption that the admission is true and therefore affects all.³⁴

³³ *Blakey's Heirs v. Blakey's Ex.*, 33 Ala. 611, 616; *Hellman v. Burritt*, 62 Conn. 438, 26 Atl. 473; *McMillan v. McDill*, 110 Ill. 47; *Campbell v. Campbell*, 138 Ill. 612, 28 N. E. 1080; *Phelps v. Hartwell*, 1 Mass. 71; *Shailer v. Bumstead*, 99 Mass. 112; *Dan v. Brown*, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395; *Schierbaum v. Schemme*, 157 Mo.

1, 80 Am. St. Rep. 604, 57 S. W. 526; *Bovard v. Wallace*, 4 Serg. & R. (Pa.) 499; *Clark v. Morrison*, 25 Pa. St. 453; *Forney v. Ferrell*, 4 W. Va. 729.

³⁴ *Morris v. Stokes*, 21 Ga. 552; *Dennis v. Weekes*, 46 Ga. 514; *Milton v. Hunter*, 13 Bush (76 Ky.) 163; *Davis v. Calvert*, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282; *Arm-*

§ 368. **The Same Subject: A Middle Ground.**

A middle ground has been taken, such as allowing the testimony to be introduced solely against the party making a declaration against his interest, holding that the jury may, upon sufficient proof, strike out his legacy and establish the balance of the will. Thus a will might be good as to one party and bad as to another, valid as to some parties and invalid as to others.³⁵ Such a rule, however, could not have universal application. If the testator lacked testamentary capacity, the will in its entirety should be rejected; the objection goes to the entire instrument, irrespective of its provisions in favor of one person or another. And if the will as a whole was procured through undue influence, the same reasoning applies. If the testator was of sound mind, but certain provisions in favor of a particular legatee or devisee were procured through the undue influence of such beneficiary, and such provisions can be eliminated without affecting or destroying the intent of the testator as expressed in the instrument, such part of the will may be rejected and the remainder may be admitted to probate.³⁶ Yet fraud and undue influence, especially the latter, are closely allied to mental incompetency.³⁷ Unless it can clearly be shown by the evidence that the testator's mind was unduly influenced or unbalanced as to the particular provisions sought

strong v. Farrar, 8 Mo. 627; Allen v. Allen's Admr., 26 Mo. 327; Barnhardt v. Smith, 86 N. C. 473. The two Missouri cases above cited were subsequently overruled in Schierbaum v. Schemme, 157 Mo. 1, 80 Am. St. Rep. 604, 57 S. W. 526.

³⁵ Morris v. Stokes, 21 Ga. 552, 569.

³⁶ Trimblestown v. D'Alton, 1 Dow & Cl. 85; Haddock v. Trotman, 1 Fost. & Fin. 31; Lyons v. Campbell, 88 Ala. 462, 7 So. 250; Eastis v. Montgomery, 93 Ala. 293, 9 So. 311; Ogden v. Greenleaf, 143 Mass. 349, 9 N. E. 745; In re Welsh, 1 Redf. Sur. (N. Y.) 238.

³⁷ See, ante, § 361.

to be eliminated from the will, and was sound and unprejudiced as to the balance, since testamentary capacity is involved in the issue it is difficult to see how the testator can be said to have been competent to make one part of the will, yet have been incompetent as to the remainder.³⁸

§ 369. The Same Subject: Inadmissible in Evidence.

The weight of authority is against admitting in evidence the admissions against interest of one of several legatees, even as against the declarant. When a will which has been offered for probate is contested, the issue is the validity of the will, whether the point in controversy be the testamentary capacity of the testator or undue influence on the part of one of the legatees in procuring the will. Should one beneficiary have made a statement that he had unduly influenced the testator, such an admission should not be received as evidence against the others who are innocent of wrong-doing. To establish undue influence, evidence is admitted which tends to show that the testator was of that peculiar mental structure, was subject to such passion or prejudice, or was of such feeble will or so mentally infirm, as to render him a prey to the influence. The liability of the testator to be affected by the undue influence is material, and evidence of mental capacity must necessarily be introduced. The same principle applies, to a degree, in a case where the charge is that the will was procured by fraud. It may be said that the existence and exercise of undue influence necessarily presuppose weakness of mind to some extent; and it is doubtful whether the acts of one of perfectly sound mind could be set aside on such a ground unless, in addition thereto, fraud or imposition was proved. And neither

³⁸ *Hildreth v. Hildreth*, 153 Ky. 597, 156 S. W. 144, 145.

fraud nor attempted influence is of consequence where the mind of the testator is sufficient to resist them.³⁹

§ 370. The Same Subject.

The validity of the will is the issue and it makes no difference whether such admissions relate to the opinion of the declarant as to the mental capacity of the testator, or his own fraudulent acts in procuring the will. In either case they are merely declarations of one party against the rights of others who do not have a joint interest with the declarant in the subject matter affected. Such admissions by one of several beneficiaries should not be received in evidence to conclude the rights of those who take under the will. The decisions are not unanimous, but the weight of authority is that such admissions should be rejected for all purposes. They can not be accepted even for the limited purpose of being considered against the declarant and not against the other interested parties, since they can not be considered by the jury without affecting the rights of others. Such evidence goes to the issue of *devisavit vel non*, in which all are interested.⁴⁰

³⁹ Shailer v. Bumstead, 99 Mass. 112, 121.

⁴⁰ Blakey's Heirs v. Blakey's Ex., 33 Ala. 611, 616; Dale's Appeal, 57 Conn. 127, 17 Atl. 757; Hellman v. Burritt, 62 Conn. 438, 26 Atl. 473; McMillan v. McDill, 110 Ill. 47; Will of Ames, 51 Iowa 596, 2 N. W. 408; Dye v. Young, 55 Iowa 433, 7 N. W. 678; Phelps v. Hartwell, 1 Mass. 71; Shailer v. Bumstead, 99 Mass. 112, 127; O'Connor v. Madison, 98 Mich. 183, 57 N. W. 105; Schierbaum v. Schemme, 157 Mo. 1, 80 Am. St.

Rep. 604, 57 S. W. 526; Osgood v. Manhattan Co., 3 Cow. (N. Y.) 612, 15 Am. Dec. 304; Dan v. Brown, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395; Matter of Kennedy's Will, 167 N. Y. 163, 60 N. E. 442; Thompson v. Thompson, 13 Ohio St. 356; Bovard v. Wallace, 4 Serg. & R. (Pa.) 499; Clark v. Morrison, 25 Pa. St. 453; Titlow v. Titlow, 54 Pa. St. 216, 93 Am. Dec. 691; Whitelaw's Admr. v. Whitelaw's Admr., 96 Va. 712, 32 S. E. 458; Forney v. Ferrell, 4 W. Va. 729.

And for the same reason, admissions against his interest by one of several contestants are inadmissible.⁴¹

§ 371. Declarations of Subscribing Witnesses.

The rule announced in the preceding section, according to the weight of authority, applies with like force to the admissions of all third parties, even though they may have been subscribing witnesses to the will. Any declaration or expression of opinion by an attesting witness, except on the witness stand and under oath, would be hearsay. He is allowed to give his opinion as to the mental condition of the testator, but if either party desires such opinion, he must call him as a witness. If the subscribing witness is dead, neither party can put in evidence any extrajudicial statements which he may have made regarding the testator's mental capacity. Such statements are not admissible for the purpose of invalidating the will.⁴²

The declarations of a legatee, whether made at about the time of the making of the will or subsequent thereto, that she had knowledge of the execution of the will and of its provisions, are not admissible in evidence on the issue of testamentary capacity.—*Ormsby v. Webb*, 134 U. S. 47, 65, 33 L. Ed. 805, 10 Sup. Ct. 478.

In *Linebarger v. Linebarger*, 143 N. C. 229, 10 Ann. Cas. 596, 55 S. E. 709, the court says: "It is elementary learning that a party's declarations against his own interest, or those claiming under him, are always competent, this being one of the exceptions to the hear-

say rule. It is equally well settled that, when the person whose declarations are sought to be shown, is alive, they are not competent against strangers, or those claiming a common but not a joint interest. That persons taking a devise, or bequest, in a will have a community of interest, but not a joint interest, is well settled."

⁴¹ *Parsons v. Parsons*, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564.

⁴² *Stobart v. Dryden*, 1 Mees. & W. 615; *Mason v. Poulson*, 40 Md. 355; *Stirling v. Stirling*, 64 Md. 138, 21 Atl. 273; *Baxter v. Abbott*, 7 Gray (Mass.) 71; *Sewall*

§ 372. Declarations Admissible for Purpose of Impeachment.

We have heretofore referred to the proof of the statements or admissions of one person by the testimony of another. Any one, be he legatee, devisee or subscribing witness, who takes the witness stand and testifies to any matter pertinent to the issue, whether it be testamentary capacity, fraud, undue influence, or other matter, can be confronted with statements he may previously have made which are at variance with his testimony, for the purpose of impeachment. If he denies having made the statements, proof of them is allowed, but only for the purpose of discrediting him as a witness.⁴³ The proponent, by calling an attesting witness to the stand to testify regarding those facts which can be established

v. Robbins, 139 Mass. 164, 29 N. E. 650; *Boardman v. Woodman*, 47 N. H. 120.

In some cases, however, the declarations of a subscribing witness to the will of a decedent to the effect that the testator was lacking in mental capacity, have been held admissible to rebut the prima facie case made by the declarant's attestation of the will. See *Townshend v. Townshend*, 9 Gill (Md.) 506; *Colvin v. Warford*, 20 Md. 357; *Black v. Ellis*, 3 Hill L. (S. C.) 68.

⁴³ *Stirling v. Stirling*, 64 Md. 138, 21 Atl. 273. See, also, *Mason v. Poulson*, 40 Md. 355.

Some decisions hold that the fact that an attesting witness subscribed his name as such to the will was in legal effect an assertion by him that the maker was mentally competent; while others

hold that the signing and attesting of a will raise no presumption of testamentary capacity. Therefore a declaration by a subscribing witness, reflecting on the competency of the testator, would not be contradictory of any act on his part, and would be hearsay. — *Baxter v. Abbott*, 7 Gray (Mass.) 71; *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650; *Boardman v. Woodman*, 47 N. H. 120; *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459.

Compare: *Speer v. Speer*, 146 Iowa 6, 140 Am. St. Rep. 268, 27 L. R. A. (N. S.) 294, 123 N. W. 176; *Crenshaw v. Johnson*, 120 N. C. 270, 26 S. E. 810; *Sellars v. Sellars*, 2 Heisk. (Tenn.) 430.

A distinction has been made between cases where the will is proved by the signature of a deceased witness (*Harden v. Hays*,

only by such a witness, does not thereby make him his witness so that he can not contradict or impeach him.⁴⁴

§ 373. Declarations Against Interest by a Sole Beneficiary Admissible in Evidence.

When there is but a sole beneficiary under a will, the situation is obviously different. Any admission against interest which he may have made can affect no one but himself. The reason for the rule which applies to the declarations of one of several legatees does not obtain where there is but one beneficiary. He is the sole party interested on one side and his declarations or admissions are admissible in evidence against him.⁴⁵ And the same rule has been applied after the death of the sole legatee, his interest under the will being represented by his heir.⁴⁶

§ 374. Classification of Witnesses Who May Testify as to Testamentary Capacity of the Testator.

Those who may be called upon to testify on the issue of the testamentary capacity of the testator may be di-

9 Pa. St. 151), and where it is otherwise established (*Fox v. Evans*, 3 Yeates (Pa.) 506). In the first instance, admissions were held admissible, but not in the last.

⁴⁴ "Nor is it correct to say, that a person who calls a witness to a will is bound to take his testimony as true. He is not his witness, but that of the law. The party is obliged to call the subscribing witness; another to the same fact will not answer. Therefore, he may contradict and discredit him, and so may any person

who uses him as the subscribing witness." — *Crowell v. Kirk*, 14 N. C. 355.

⁴⁵ *McMillan v. McDill*, 110 Ill. 47; *Campbell v. Campbell*, 138 Ill. 612, 28 N. E. 1080; *Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285; *Wallis v. Luhring*, 134 Ind. 447, 34 N. E. 231; *Lundy v. Lundy*, 118 Iowa 445, 92 N. W. 39; *Stull v. Stull*, 1 Neb. Unof. 380, 389, 96 N. W. 196; *Fairchild v. Bascomb*, 35 Vt. 398.

⁴⁶ *Wallis v. Luhring*, 134 Ind. 447, 34 N. E. 231.

vided into three general classes: Subscribing witnesses to the will, experts, and lay witnesses generally. This classification is of importance when a witness is called upon to express an opinion. It is the general rule that a witness may testify only as to facts within his personal knowledge, and may not express his opinion or judgment as to matters which the court or the jury is required to determine, or which constitute elements of such determination.⁴⁷ There are, however, exceptions to this rule, and where, in a will contest, the question of testamentary capacity is involved, witnesses may, in varying degrees and under varying circumstances, state their opinions.⁴⁸

§ 375. Subscribing Witnesses Should Satisfy Themselves That the Testator Is of Sound Mind.

The decisions are not harmonious as to whether or not the fact that a witness attests the will of another in effect makes him vouch for the mental capacity of the testator. It may be well, however, to first refer to some of the matters involved. In the absence of statutory requirement, it is not necessary to state in the attestation clause that the testator was of sound mind.⁴⁹ The witness need

⁴⁷ Wyman v. Gould, 47 Me. 159; Robinson v. Adams, 62 Me. 369, 410, 16 Am. Rep. 473; De Witt v. Barley, 9 N. Y. 371; s. c., De Witt v. Barley, 17 N. Y. 340; Clapp v. Fullerton, 34 N. Y. 190, 195, 90 Am. Dec. 681; O'Brien v. People, 36 N. Y. 276, 282; Van Pelt v. Van Pelt, 30 Barb. (N. Y.) 134, 141; Gehrke v. State, 13 Tex. 568.

Compare: State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; Delafield v. Parish, 25 N. Y. 9, 37, 38.

Contra: Hardy v. Merrill, 56 N. H. 227, 22 Am. Rep. 441.

⁴⁸ See, post, §§ 380-382, as to opinion evidence of subscribing witnesses.

See, post, §§ 376-379, as to opinion evidence of expert witnesses.

See, post, §§ 383-388, as to lay witnesses testifying to their opinions.

⁴⁹ Murphy v. Murphy, 24 Mo. 526. See, also, Fry v. Morrison, 159 Ill. 244, 42 N. E. 774.

not know the contents of the instrument,⁵⁰ and unless the law requires publication or acknowledgment by the testator of the instrument as his will, the witness may not know the nature of the document.⁵¹ It is said, however, that it is the duty of an attesting witness to judge of the testator's mental capacity as well as to protect him against fraud in the execution of his will.⁵² Even where the subscribing witnesses relied upon the declarations of another as to the mental condition of the testator, it has been said that such was not sufficient evidence to justify them in putting their names to the will as witnesses, and that it was in fact a fraud upon those whose rights were affected thereby.⁵³ The weight of authority is that no person is justified in attesting a will unless he knows from the testator himself that the tes-

⁵⁰ *Leverett's Heirs v. Carlisle*, 19 Ala. 80; *Turner v. Cook*, 36 Ind. 129, 136; *In re Higdon's Will*, 6 J. J. Marsh (29 Ky.) 444, 22 Am. Dec. 84; *Roche v. Nason*, 105 App. Div. (N. Y.) 256, 93 N. Y. Supp. 565; *In re Baker's Appeal*, 107 Pa. St. 381, 52 Am. Rep. 478.

⁵¹ *Gould v. Chicago Theological Seminary*, 189 Ill. 282, 59 N. E. 536; *Savage v. Bulger*, 25 Ky. Law Rep. 763, 76 S. W. 361; *Skinner v. American Bible Soc.*, 92 Wis. 209, 65 N. W. 1037.

⁵² "It is the duty of subscribing witnesses to inform themselves of the testator's mental capacity before attesting the will. Witnesses are required by the law not alone to protect the testator against fraud in the execution of his will, but also to judge of his capacity,

which is primarily established by their oaths when the will is offered for probate; but it will be presumed, until the contrary is shown, that they have discharged their duty."—*Jones v. Collins*, 94 Md. 403, 51 Atl. 398.

But compare *Williams v. Lee*, 47 Md. 321, where two surviving attesting witnesses, one of whom had prepared a codicil to the will which was offered for probate with it, testified that the testatrix was incompetent at the date of the execution of her will and the codicil in question. The circumstances of the case, however, were satisfactorily explained, they being merely to humor the follies of an unbalanced mind.

⁵³ *Scribner v. Crane*, 2 Paige (N. Y.) 147, 21 Am. Dec. 81.

tator understands what he is doing, and unless the witness is satisfied in his own mind as to the testator's mental capacity. A person, signing his name as a witness to a will, by his act of attestation vouches for the sanity of the testator.⁵⁴ And if a subscribing witness thereafter attempts to give testimony discrediting the mental capacity of the testator, such evidence should be received with caution and closely scrutinized.⁵⁵ The circumstances of the case, however, may cause the rule to relax.⁵⁶ And in some decisions it is held that no inference can be drawn from the mere fact that a person sub-

⁵⁴ *In re Tyler's Estate*, 121 Cal. 405, 413, 53 Pac. 928; *In re Nelson's Estate*, 132 Cal. 182, 183, 64 Pac. 294; *In re Motz's Estate*, 136 Cal. 558, 69 Pac. 294; *In re Field's Appeal*, 36 Conn. 277; *Withinton v. Withinton*, 7 Mo. 589; *Southworth v. Southworth*, 173 Mo. 59, 73, 73 S. W. 129; *Hughes v. Rader*, 183 Mo. 630, 702, 82 S. W. 32; *Thomasson v. Hunt*, (Mo.) 185 S. W. 165; *Heyward v. Hazard*, 1 Bay. (S. C.) 335; *Young v. Barner*, 27 Grat. (Va.) 96.

"By placing his name to the instrument the witness, in effect, certifies to his knowledge of the mental capacity of the testator; and that the will was executed by him freely and understandingly, with a full knowledge of its contents. Such is the legal effect of the signature of the witness when he is dead or out of the jurisdiction of the court."—*Scribner v. Crane*, 2 Paige (N. Y.) 147, 21 Am. Dec. 81.

⁵⁵ *In re Nelson's Estate*, 132 Cal. 182, 183, 64 Pac. 294; *Thomasson v. Hunt*, (Mo.) 185 S. W. 165; *Young v. Barner*, 27 Grat. (Va.) 96; *In re Lewis' Will*, 51 Wis. 101, 7 N. W. 829; *Loughney v. Loughney*, 87 Wis. 92, 58 N. W. 250.

"When a witness who has solemnly subscribed his name to a will as an attesting witness, knowing the nature of his act, and that deceased would rely upon his name as a part of the execution of the will, undertakes by his evidence to overthrow or cast suspicion upon it, his evidence should be closely scrutinized."—*In re Motz's Estate*, 136 Cal. 558, 69 Pac. 294, citing *In re Tyler's Estate*, 121 Cal. 405, 413, 53 Pac. 928.

⁵⁶ "This rule, though just in its general application, ought not to be vigorously applied to a case like this, when the circumstances clearly show that the witnesses were suddenly called on and, with a haste dictated by the author and propounder of the paper, which

scribed his name as a witness to a will, and that by such act he does not express a silent belief that the testator is of sound mind.⁵⁷

§ 376. Opinions of Medical Experts Admissible.

An exception to the general rule that a witness must testify only as to facts within his own knowledge and not express merely his belief, is that an expert, one having a special knowledge of the matter in controversy, may give his opinion. A medical expert, one who by study and experience is familiar with the symptoms of mental disorders, may, by stating his belief, assist the court or jury in arriving at a correct conclusion. The opinion of such

left them no time for due deliberation; and when called upon to testify, as they were, in behalf of the propounder, they were in duty bound to detail truly the facts and circumstances, in doing which they offered the only available and reliable data from which to draw proper judicial conclusions. They do not, therefore, strictly speaking, occupy the attitude of subscribing witnesses seeking to invalidate the will, but rather that of such witnesses disclosing the circumstances which led them to act inadvertently, and the facts touching and incident thereto."—*Tucker v. Sandidge*, 85 Va. 546, 571, 8 S. E. 650.

⁵⁷ In *Baxter v. Abbott*, 7 Gray (Mass.) 71, the court says: "The fact that he attested the will as a witness does not, we think, furnish evidence of any opinion he had as to the sanity of the tes-

tator. He may have had no opinion on the subject. He may have attested the will with the full belief that the testator was insane, and with the view of testifying to that opinion whenever the will should be offered for probate. No inference as to his opinion can be drawn from the mere fact of signing; and therefore evidence of a contradictory opinion expressed by him was inadmissible."

Strangers frequently execute wills when they are unknown to the subscribing witnesses. By accepting an introduction by name, and by signing such name to his will, the testator acknowledges his identity. This is ordinarily sufficient unless identity is made a special issue by the pleadings.—*Harris v. Martin*, 150 N. C. 367, 17 Ann. Cas. 685, 21 L. R. A. (N. S.) 531, 64 S. E. 126.

an expert may be based on facts within his personal knowledge, or be an answer to a hypothetical question based on the testimony of others.⁵⁸ The opinion can not be asked on hypothetical facts not in evidence in the case.⁵⁹ The force and weight of such opinion must necessarily depend upon the truth or falsity of the facts embodied in the question. If the facts are erroneously assumed, or determined to be untrue, the opinion of the expert that the testator was insane would not destroy the presumption of testamentary capacity.⁶⁰

§ 377. Who Are Medical Experts.

The general rule is that a practicing physician may give his opinion regarding insanity without having made a specialty of such subject.⁶¹ But a physician who has devoted his time to some other branch of the profession

⁵⁸ *In re Overpeck's Will*, 144 Iowa 400, 120 N. W. 1044, 122 N. W. 928; *In re Eveleth's Will*, (Iowa) 157 N. W. 257; *Crockett v. Davis*, 81 Md. 134, 149, 31 Atl. 710; *Jones v. Collins*, 94 Md. 403, 51 Atl. 398; *May v. Bradlee*, 127 Mass. 414; *Kempsey v. McGinniss*, 21 Mich. 123; *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545.

Books on medical science or insanity, if objected to, can not be read in evidence. — *McNaghten's Case*, 10 Cl. & Fin. 200; *Ware v. Ware*, 8 Greenl. (Me.) 42; *Davis v. State*, 38 Md. 15; *Commonwealth v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401.

⁵⁹ *Harrison v. Rowan*, 3 Wash. C. C. 580, 587, Fed. Cas. No. 6141; *Duffield v. Robeson*, 2 Har. (Del.)

375, 385; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Hurst v. Chicago, Rock Island & P. R. Co.*, 49 Iowa 76, 79; *In re Ames*, 51 Iowa 596, 2 N. W. 408; *Commonwealth v. Rich*, 14 Gray (Mass.) 335; *Gibson v. Gibson*, 9 Yerg. (17 Tenn.) 329.

⁶⁰ *Philips v. Philips*, 77 App. Div. (N. Y.) 113, 78 N. Y. Supp. 1001.

⁶¹ *Davis v. United States*, 165 U. S. 373, 41 L. Ed. 750, 17 Sup. Ct. 360; *Porter v. State*, 140 Ala. 87, 37 So. 81; *Matter of Mullin's Estate*, 110 Cal. 252, 42 Pac. 645; *People v. Sowell*, 145 Cal. 292, 78 Pac. 717; *In re Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973; *Taylor v. State*, 83 Ga. 647, 10 S. E. 442; *Schneider v.*

and has not made a study of or had experience with insanity cases, is lacking in the qualifications required for an expert in matters of testamentary capacity.⁶² The case would be different were he the attending physician, for in such capacity his professional duties require that he acquaint himself with all the peculiar mental and physical characteristics of the patient, and he can thus testify from his own knowledge and state his opinion.⁶³

§ 378. Medical Experts Should State Facts to Give Their Opinions Weight.

The general rule is that the opinion of an expert is admissible only if the subject matter is within the range

Manning, 121 Ill. 376, 12 N. E. 267; *White v. McPherson*, 183 Mass. 533, 67 N. E. 643; *Rivard v. Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681; *People v. Barber*, 115 N. Y. 475, 22 N. E. 182; *People v. Hoch*, 150 N. Y. 291, 44 N. E. 976.

⁶² *Reed v. State*, 62 Miss. 405.

"The mere fact that a person was by education a physician, if he had not practiced his profession, we should not deem sufficient to justify his admission as an expert. So if he devoted himself exclusively to one branch of his profession and had no practical experience in that subject-matter to which he was called to testify—as if an oculist was called to testify about insanity—we should not deem him admissible."—*Fairchild v. Bascomb*, 35 Vt. 398.

A physician who has not made the subject of mental disease a

special study is not competent to testify whether a person living in his neighborhood and well known to him, but who had never been his patient, was competent to apply the rules of right and wrong in a state of circumstances concerning which he was under high excitement or the influence of an uncontrollable impulse.—*Commonwealth v. Rich*, 14 Gray (Mass.) 335.

⁶³ *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352, 33 Atl. 160.

"It is the duty of the attending physician to make himself acquainted with the peculiarities, bodily and mental, of the person who is the subject of his care and advice, and he has the experience which results from the performance of the same duty in other cases. He is therefore permitted to testify from his own observation to his opinion of his

of his particular study, and that it is one which the ordinary knowledge and experience of life do not enable the layman to draw proper inferences.⁶⁴ The question as to whether or not a testator had possessed testamentary capacity when he made his will is not always best solved by abstruse metaphysical analysis. An expert may better diagnose a case, he may explain it in scientific terms, but he can not better observe common facts or definitely tell when a mental derangement has reached the stage where the sound mind changes to unsound.⁶⁵

Although it has been held that a physician may give his opinion as to the mental capacity of a testator without stating the facts in his possession upon which he bases his belief, leaving the weight of his opinion to be tested on cross-examination,⁶⁶ yet the facts should be stated. If the opinion of the physician is not given in answer to a hypothetical question, in order that he be allowed to express it, it should be shown that he had the means of adequate personal observation.⁶⁷ Then again, although an expert may testify as to the degree of the

patient's mental capacity to make a will, in connection with the facts upon which that opinion is founded."—*Hastings v. Rider*, 99 Mass. 622.

⁶⁴ *Muldowney v. Illinois Cent. Ry. Co.*, 36 Iowa 462, 473; *Metro-politan Sav. Bank v. Manion*, 87 Md. 68, 80, 39 Atl. 90.

Where it was in evidence that a Romish priest, versed in physiology and psychology, and daily required to exercise his judgment upon the question of mental condition, had examined the testatrix

to learn whether she was in a proper condition of mind to make a confession, it was held that he was competent to give an opinion as to her mental condition.—*In re Toome's Estate*, 54 Cal. 509, 35 Am. Rep. 83.

⁶⁵ *Rutherford v. Morris*, 77 Ill. 397; *Berry v. Safe Deposit & T. Co.*, 96 Md. 45, 53 Atl. 720.

⁶⁶ *Crockett v. Davis*, 81 Md. 134, 149, 31 Atl. 710; *Jones v. Collins*, 94 Md. 403, 51 Atl. 398.

⁶⁷ *Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

intelligence of the testator, yet testamentary capacity is a question of fact, and is the ultimate fact which the court or jury must determine.⁶⁸

§ 379. The Same Subject.

An abstract opinion is of little value and is not sufficient, without facts to sustain it, to justify the rejection of a will offered for probate.⁶⁹ If a physician expresses an opinion based on personal knowledge and not in answer to a hypothetical question, he should state the facts upon which it is founded. The facts furnish the safest evidence and the court or jury may draw its own inferences. Opinions are not to be disregarded, but the facts should also be stated, and it then must be left to the court or jury to determine whether the facts, as well as the opinion based upon them, are true or false.⁷⁰

⁶⁸ *Baker v. Baker*, 202 Ill. 595, 67 N. E. 410; *Kempsey v. McGinniss*, 21 Mich. 123; *Page v. Beach*, 134 Mich. 51, 95 N. W. 981; *In re Peterson*, 136 N. C. 13, 48 S. E. 561; *Nashville etc. R. Co. v. Brundige*, 114 Tenn. 31, 4 Ann. Cas. 887, 84 S. W. 805.

The opinions of witnesses, expert or non-expert, must be as to the state of the testator's mind at the time the will was made. The question of testamentary capacity is for the jury; and they can not give their opinions as to this ultimate fact.—*Councill v. Mayhew*, 172 Ala. 295, 55 So. 314.

A verdict can not be upset by subsequently showing that the experts had no understanding of the true criterion of testamentary ca-

capacity.—*Appleby v. Brock*, 76 Mo. 314.

⁶⁹ *Burley v. McGough*, 115 Ill. 11, 3 N. E. 738.

In Stackhouse v. Horton, 15 N. J. Eq. 202, Chancellor Green says: "The abstract opinion of any witness, medical or of any other profession, is not of any importance. No judicial tribunal would be justified in deciding against the capacity of a testator upon the mere opinion of witnesses, however numerous or respectable. . . . The opinion of a witness must be brought to the test of facts that the court may judge what estimate the opinion is entitled to."

⁷⁰ *Hathorn v. King*, 8 Mass. 371, 5 Am. Dec. 106; *Dickinson v. Bar-*

§ 380. Subscribing Witnesses May State Opinions as to Sanity or Insanity of Testator.

On the issue of testamentary capacity the testimony of subscribing witnesses is of great importance. Having been present at the time of the execution of the will, having to a greater or less extent had their attention directed to the nature of the act the testator was performing, having been called on to subscribe their names to a particular document as witnesses, and having had the opportunity of observing the actions of the testator and all surrounding circumstances at the particular moment as to which the mental capacity is to be determined, subscribing witnesses, although not experts, are allowed to give their opinions as to the sanity or insanity of the testator at that time,⁷¹ and as a general rule a non-expert subscribing witness may state his belief, without

ber, 9 Mass. 225, 227, 6 Am. Dec. 58; *Hastings v. Rider*, 99 Mass. 622; *Baxter v. Abbott*, 7 Gray (Mass.) 71; *Kempsey v. McGinniss*, 21 Mich. 123; *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545; *Clark v. State*, 12 Ohio 483, 40 Am. Dec. 481; *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329.

In *Prinsep and The East India Co. v. Dyce Sombre*, 10 Moore P. C. C. 232, 248, the court says: "It may be right to observe that the judges of the Prerogative Court, where questions of insanity are so frequently mooted, have always held that the most important evidence where medical persons have been examined, is the facts to which they depose, rather than the opinions they have

formed; that court holding it more proper to draw its conclusions from facts rather than from the inferences of others, however skilled in cases of insanity; not that the opinions of medical persons are disregarded, but that facts depose to furnish the safest evidence on which a judgment can be founded."

⁷¹ In *re Crandall's Appeal*, 63 Conn. 365, 38 Am. St. Rep. 375, 28 Atl. 531; *Taylor v. Cox*, 153 Ill. 220, 38 N. E. 656; *Wallace v. Whitman*, 201 Ill. 59, 66 N. E. 311; *Parsons v. Parsons*, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564; *Furlong v. Carraher*, 108 Iowa 492, 493, 79 N. W. 277; *Hertrich v. Hertrich*, 114 Iowa 643, 89 Am. St. Rep. 389, 87 N. W. 689; *Durant*

giving the facts upon which it is founded.⁷² The opinion of a subscribing witness, however, must be based on what he saw and heard at the time the will was made. He can not give his belief in answer to hypothetical questions; in that respect he is the same as any non-expert witness.⁷³ And his opinion should be limited to that which he had at the time the will was executed, not to one subsequently formed.⁷⁴

§ 381. Subscribing Witnesses Should State Facts So That Value of Opinions May Be Judged.

The facts upon which the opinion of a subscribing witness is based may in all cases be called for in the cross-examination, and the court or jury must be left to determine whether the facts stated, as well as the opinion

v. Whitcher, 97 Kan. 603, 156 Pac. 739; Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; Williams v. Lee, 47 Md. 321; Whisner v. Whisner, 122 Md. 195, 89 Atl. 393; Hastings v. Rider, 99 Mass. 622; Barker v. Comins, 110 Mass. 477, 487; Nash v. Hunt, 116 Mass. 237, 251; May v. Bradlee, 127 Mass. 414, 421; Beaubien v. Cicotte, 12 Mich. 459; Appleby v. Brock, 76 Mo. 314; Hardy v. Merrill, 56 N. H. 227, 22 Am. Rep. 441; Elkin-ton v. Brick, 44 N. J. Eq. 154, 1 L. R. A. 161, 15 Atl. 391; De Witt v. Barley, 9 N. Y. 371; Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Kaufman v. Caughman, 49 S. C. 159, 61 Am. St. Rep. 808, 27 S. E. 16.

⁷² Scott v. McKee, 105 Ga. 256, 31 S. E. 183; Parsons v. Parsons, 66 Iowa 754, 21 N. W. 570, 24 N. W.

564; Furlong v. Carraher, 108 Iowa, 492, 493, 79 N. W. 277; Hert-rich v. Hertrich, 114 Iowa 643, 89 Am. St. Rep. 389, 87 N. W. 689; Jones v. Collins, 94 Md. 403, 51 Atl. 398; Robinson v. Adams, 62 Maine 369, 16 Am. Rep. 473; Williams v. Spencer, 150 Mass. 346, 15 Am. St. Rep. 206, 5 L. R. A. 790, 23 N. E. 105; Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Titlow v. Titlow, 54 Pa. St. 216, 93 Am. Dec. 691. But see Kempsey v. McGinniss, 21 Mich. 123; Rice v. Rice, 50 Mich. 448, 15 N. W. 545; Turner v. Cheesman, 15 N. J. Eq. 243.

⁷³ Pittard v. Foster, 12 Ill. App. 132; Doe v. Reagan, 5 Blackf. (Ind.) 217, 33 Am. Dec. 466.

⁷⁴ Williams v. Spencer, 150 Mass. 346, 15 Am. St. Rep. 206, 5 L. R. A. 790, 23 N. E. 105.

based thereon, are worthy of belief. It is only with a knowledge of the groundwork of an opinion that the court or jury can judge of its value.⁷⁵ Where a subscribing witness has testified to the actions and conduct of the testator at the time the will was executed, a question which calls upon him to state his opinion as to the mental capacity at such time of the testator to execute the will and to know its effects upon his children and property, does not call for the condition of the testator's mind based upon the fact that the witness was one of the subscribing witnesses to the will, but asks for his opinion as to the testator's condition of mind based upon the testimony which he has given. If such witness has not, in his testimony, stated any facts disclosing unsoundness of mind, the contestant could not successfully object if the court refuses to allow an answer.⁷⁶

§ 382. The Weight Given to Opinions of Subscribing Witnesses.

The law presumes that a subscribing witness had his attention directed to and noted the mental capacity of the testator, therefore his opinion should be entitled to more weight than that of one who was merely passive. Having the duty of observation, it will be presumed that a subscribing witness was more observant than others might have been.⁷⁷ There is a conflict of opinion, however, but the better rule is that the opinion of a subscribing witness is entitled to more weight than the opin-

⁷⁵ *Kempsey v. McGinniss*, 21 Mich. 123; *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545; *Titlow v. Titlow*, 54 Pa. St. 216, 93 Am. Dec. 691.

⁷⁶ *Furlong v. Carraher*, 108 Iowa 492, 493, 79 N. W. 277.

⁷⁷ *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Poole v. Richardson*, 3 Mass. 330; *Clary's Admrs. v. Clary*, 2 Ired. L. (24 N. C.) 78.

See, ante, § 375; also as to subscribing witness attempting to discredit the mental competency of the testator.

ion of a non-expert witness who was not present at the time the will was made, all other matters being equal.⁷⁸ But any person of equal intelligence, present at the time the will was executed and who had equal opportunity for observation as did a subscribing witness, and who can testify as to the facts, should be able to give an opinion entitled to equal weight with that of an attesting witness.⁷⁹ Neither the opinion nor the testimony of a subscribing witness is conclusive and he may be contradicted by other evidence.⁸⁰

§ 383. Opinions of Lay Witnesses Depend Upon Knowledge of Facts.

All men have more or less knowledge regarding sanity or insanity, and can express their conclusions from facts which they have personally observed, which are entitled to weight according to their mental capacity and habits of observation. Upon the issue of testamentary capacity such a person, being non-expert, when called to the witness stand can not give in evidence his opinion based on facts set forth in a hypothetical question or upon facts testified to by others; yet where such a witness has personal knowledge of the facts and circumstances involved in the controversy, his judgment in such matter, which

⁷⁸ *Kerr v. Lunsford*, 31 W. Va. 659, 2 L. R. A. 668, 8 S. E. 493.

Contra: *Turner v. Cheesman*, 15 N. J. Eq. 243.

⁷⁹ *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. 685; *In re Crandall's Appeal*, 63 Conn. 365, 38 Am. St. Rep. 375, 28 Atl. 531.

⁸⁰ *Lowe v. Joliffe*, 1 W. Bl. 365; *Cilley v. Cilley*, 34 Maine, 162, 163;

Martin v. Perkins, 56 Miss. 204; *Orser v. Orser*, 24 N. Y. 51.

The will of a married woman, executed under a power which enabled her to so dispose of certain property, which was attested by two witnesses, was held valid although the two subscribing witnesses testified to the insanity of the testatrix. — *Le Breton v. Fletcher*, 2 Hagg. Ecc. 558.

is to a greater or less extent understood by all of ordinary intelligence, is of value. The weight of such judgment depends upon the intelligence of the witness and the opportunity for and extent of his observations.⁸¹ It is also affected by the nature of the derangement with which the testator had been afflicted, since in some cases the insanity may be so pronounced that it can be detected by but slight observation, while in other cases the symptoms may be so obscure that their existence might pass unnoticed except upon the closest scrutiny.

§ 384. Lay Witnesses Must State Opportunity for Observation.

Where a non-expert witness, from personal observation and knowledge of the appearance, manner, habits, conduct and speech of a testator, states his belief regarding the testator's sanity or insanity, although it is generally designated as an opinion since it is a conclusion of the witness based upon facts personally known to him and which can not be fully and accurately communicated to others, yet it is in reality a statement of fact. Wild or irrational conduct, silly or incoherent language, can not be described or repeated so as to convey to the court or jury the impression which had been received by one who actually saw and heard. It may be impossible for a witness to recite in full detail all the independent facts upon which he bases his opinion; he may have been impressed by declarations, actions, or circumstances which he but vaguely, if at all, remembers.⁸² The witness should

⁸¹ *Baker v. Baker*, 202 Ill. 595, 67 N. E. 410.

⁸² In no other way than this can the full knowledge of an unprofessional witness with regard to the issue be placed before the jury,

because ordinarily it is impossible for such a witness to give an adequate description of all the appearances which to him have indicated sanity or insanity. Such testimony has been well described as

state his opportunity for observation and the reasons for his opinion as to the general fact of sanity or insanity of the testator, and from such evidence it is for the court or jury to test the judgment of the witness and thus arrive at the ultimate conclusion. It is the province of the court or jury to judge of the credibility of the witness and of the truth or falsity of the facts presented in evidence, and all opinions should be given weight according to the character of the witness and the truth of the facts upon which they are based.⁸³

a compendious mode of ascertaining the result of the actual observations of witnesses. Ordinarily, and perhaps necessarily, the witness in testifying to his opportunities for, and his actual observation, relates more or less fully the instances of his conversation or dealings with the person whose mental capacity is under consideration, and it is, of course, competent, either upon direct or cross-examination, to elicit those instances in detail.—*Turner v. American Security and Trust Co.*, 213 U. S. 257, 53 L. Ed. 788, 29 Sup. Ct. 420.

"Wherever the particulars are quite numerous, a witness is allowed to testify what he knows as the result of his observation of facts, and thus to testify to the general fact rather than to recite every circumstance that conduces to that knowledge. . . . This rule has been very generally in this country applied to the case of insanity." Such rule prevailed in the ecclesiastical courts of Eng-

land, but not in their courts of common law. It has always prevailed in Connecticut.—*Dunham's Appeal*, 27 Conn. 192, 198.

The paucity of language and the inability of witnesses to describe graphically the facts which they have observed and which left definite impressions in their minds, render every effort to convey to the jury an adequate conception of the ultimate fact futile, except by announcing the conclusions of their own minds.—*Holland v. Zollner*, 102 Cal. 633, 636, 36 Pac. 930, 37 Pac. 231.

⁸³ *Powell v. State*, 25 Ala. 21, 28; *People v. Sanford*, 43 Cal. 29; *Grant v. Thompson*, 4 Conn. 203, 10 Am. Dec. 119; *Dunham's Appeal*, 27 Conn. 192, 193; *Duffield v. Morris's Exr.*, 2 Har. (Del.) 375, 384; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Rutherford v. Morris*, 77 Ill. 397; *Butler v. St. Louis Life Ins. Co.*, 45 Iowa 93; *State v. Klinger*, 46 Mo. 224, 229; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *State v. Archer*, 54 N. H. 465;

§ 385. Lay Witnesses May State Facts and Give Opinion Based on Them.

It is well settled that a non-expert witness, although not a subscribing witness and not present at the execution of the will, may testify as to the mental condition of the testator, provided he had adequate opportunity for observation and formation of judgment. Where such a lay witness has had sufficient opportunity to observe the speech and conduct of a testator he may, in addition to relating the significant instances of speech and conduct, give his opinion as to the mental capacity of the testator formed at the time from such observation. Before he can express such opinion, however, he must first state the facts upon which his conclusion rests. After fully stating the facts, he may state his opinion.⁸⁴ If such facts fairly warrant the conclusion which the witness

Hardy v. Merrill, 56 N. H. 227, 22 Am. Rep. 441; *De Witt v. Barley*, 17 N. Y. 340, 342; *Hewlett v. Wood*, 55 N. Y. 634; *Clark v. State*, 12 Ohio 483, 40 Am. Dec. 481; *Wilkinson v. Pearson*, 23 Pa. St. 117, 119; *Pidcock v. Potter*, 68 Pa. St. 342, 8 Am. Rep. 181; *Dove v. State*, 3 Heisk. (50 Tenn.) 348; *Holcomb v. State*, 41 Tex. 125; *Morse v. Crawford*, 17 Vt. 499, 44 Am. Dec. 349; *Hathaway's Admr. v. National Life Ins. Co.*, 48 Vt. 335.

⁸⁴ *Connecticut Mutual Life Ins. Co. v. Lathrop*, 111 U. S. 612, 28 L. Ed. 536, 4 Sup. Ct. 533; *Queenan v. Oklahoma*, 190 U. S. 548, 47 L. Ed. 1175, 23 Sup. Ct. 762; *Turner v. American Security & Trust Co.*, 213 U. S. 257, 53 L. Ed.

788, 29 Sup. Ct. 420; *Macafee v. Higgins*, 31 App. D. C. 355; *Jarvis v. State*, 70 Ark. 613, 67 S. W. 76; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Credille v. Credille*, 131 Ga. 40, 61 S. E. 1042; *Snell v. Weldon*, 239 Ill. 279, 87 N. E. 1022; *Pelamourges v. Clark*, 9 Iowa 1; *Parsons v. Parsons*, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564; *Durant v. Whitcher*, 97 Kan. 603, 156 Pac. 739; *State v. Smith*, 106 La. 33, 30 So. 248; *Waters v. Waters*, 35 Md. 531, 542; *Kelly v. Kelly*, 103 Md. 548, 63 Atl. 1082; *Whisner v. Whisner*, 122 Md. 195, 89 Atl. 393; *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545; *Roberts v. Bidwell*, 136 Mich. 191, 98 N. W. 100; *Lamb v. Lynch*, 56 Neb. 135, 76 N. W. 428; *Morris v. Osborne* (*Morris v. Tom-*

draws from them, the conclusion is entitled to weight; but if the facts disclosed as the basis of opinion do not legally and logically justify it, such opinion is ordinarily

linson), 104 N. C. 609, 10 S. E. 476; *Crenshaw v. Johnson*, 120 N. C. 270, 26 S. E. 810; *Clary's Admsrs. v. Clary*, 2 Ired. L. (24 N. C.) 78; *In re Rawlings' Will*, 170 N. C. 58, 86 S. E. 794, 795; *Auld v. Cathro*, 20 N. D. 461, *Ann. Cas.* 1913A, 90, 32 L. R. A. (N. S.) 71, 128 N. W. 1025; *White v. Holmes* (Tex. Civ.), 129 S. W. 874; *Hopkins v. Wampler*, 108 Va. 705, 62 S. E. 926.

Contra: *Wyman v. Gould*, 47 Maine 159; *Hastings v. Rider*, 99 Mass. 622; *Smith v. Smith*, 157 Mass. 389, 32 N. E. 348; *Ratigan v. Judge*, 181 Mass. 572, 64 N. E. 204; *McCoy v. Jordan*, 184 Mass. 575, 69 N. E. 358.

See, also, *Boardman v. Woodman*, 47 N. H. 120, but overruled in *Hardy v. Merrill*, 56 N. H. 227, 22 *Am. Rep.* 441.

In New York, such non-expert witness may only state whether the conduct of the testator was rational or irrational.—*Clapp v. Fullerton*, 34 N. Y. 190, 90 *Am. Dec.* 681; *Rider v. Miller*, 86 N. Y. 507; *Holcomb v. Holcomb*, 95 N. Y. 316; *Wyse v. Wyse*, 155 N. Y. 367, 49 N. E. 942.

The husband of a beneficiary is a competent witness to express his opinion based upon what he observed while in the presence of the testator.—*Ray v. Westall*, 267 Mo. 130, 183 S. W. 629.

Cal. Civ. Code, § 1870, sub. 10, provides that evidence may be given of "the opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given." The above permits in evidence the opinion of an intimate acquaintance as to the mental sanity of a testator, but with the opinion must be given the facts upon which it is founded; the opinion itself can have no weight other than that which the reasons bring to its support.—*In re Dolbeer's Estate*, 149 Cal. 227, 9 *Ann. Cas.* 795, 86 Pac. 695, 699.

Intimate acquaintances, by virtue of the existence of such intimacy, are permitted to testify and give their opinion upon the question of the sanity or insanity of the deceased, and the weight of this opinion evidence in each instance depends upon the facts forming the basis of it.—*In re Martin's Estate*, 170 Cal. 657, 151 Pac. 138.

Opinions of persons acquainted with the testator's business and social habits are admissible.—*Brook's Estate*, 54 Cal. 471.

A neighbor who had known the testator for a long time and had

of little probative weight as evidence of mental incapacity.⁸⁵ Facts must be stated so that it may be seen whether the conclusion deduced from them by the witness has any relation to or fairly depends upon them.⁸⁶ If a witness who is neither an expert nor a subscribing witness, does not disclose such facts and such adequate means of knowledge as to qualify him to give his opinion, he can not state his conclusions as to the mental capacity of the testator.⁸⁷ And such a witness can not express an opinion based upon facts not personally observed by him.⁸⁸

§ 386. The Same Subject: Opinion Must Be Based on Facts Given in Evidence by Witness.

In interrogating a non-expert witness as to his opinion of the soundness of the testator's mind when the will

often dealt with him and conversed with him before and after the making of the will, is competent to give an opinion as to the soundness of his mind.—*Ryman v. Crawford*, 86 Ind. 262.

The curator of one adjudged insane may say whether he ever observed any fact which led him to infer that there was any derangement of intellect.—*May v. Bradlee*, 127 Mass. 414.

⁸⁵ *Walker v. Struthers*, 273 Ill. 387, 112 N. E. 961; *Alvord v. Alvord*, 109 Iowa 113, 80 N. W. 306; *Berry Will Case*, 93 Md. 560, 49 Atl. 401; *Wood v. Carpenter*, 166 Mo. 465, 66 S. W. 172; *Story v. Story*, 188 Mo. 110, 128, 86 S. W. 225; *Thomasson v. Hunt*, (Mo.) 185 S. W. 165; *Farnsworth v. Noffsinger*, 46 W. Va. 410, 33 S. E. 246.

The opinion of a non-expert witness that the testator was not of sound mind, is entitled to no weight when he states no facts or circumstances which would induce a reasonable belief of unsoundness of mind.—*Lloyd v. Rush*, 273 Ill. 489, 113 N. E. 125, citing *Brainard v. Brainard*, 259 Ill. 613, 103 N. E. 45.

⁸⁶ *Whisner v. Whisner*, 122 Md. 195, 89 Atl. 393.

⁸⁷ *In re Berry's Will*, 93 Md. 560, 49 Atl. 401; *Smith v. Shuppner*, 125 Md. 409, 418, 93 Atl. 514; *Coughlin v. Cuddy*, 128 Md. 76, 96 Atl. 869.

⁸⁸ *Appleby v. Brock*, 76 Mo. 314; *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; *Bell v. McMaster*, 29 Hun (N. Y.)

was executed, the question should be confined to facts regarding which the witness has testified, and the opinion must be based on such facts. To ask for an opinion generally, allowing the witness to exercise his discretion as to what facts or circumstances he should consider in arriving at a conclusion, is erroneous.⁸⁹ The test of testamentary capacity may be stated generally to be whether or not the testator was of sound and disposing mind when he executed his will. The opinion of a witness, when admissible, should be directed to such point. A question calling for an opinion as to whether the testator was "entirely sane" would be objectionable.⁹⁰ And to ask a non-expert witness whether or not a testator was in a mental condition to make a will should not be allowed, since it calls for the opinion of the witness as to the degree of mental capacity required by law.⁹¹

§ 387. The Same Subject: Distinction Between Opinions as to Sanity and as to Insanity.

A person of sound mind conducts himself rationally and does not manifest those eccentricities which mark the conduct of an unbalanced mind. The rational actions of a normal being pass apparently unnoticed, while irrational conduct springing from a disordered mind attracts attention. There is therefore a distinction as to the nature of the opinion requested of a non-expert witness. If he testifies that the person is sane, it is, in effect,

272; *In re Ross*, 87 N. Y. 514; 564; *Rice v. Rice*, 50 Mich. 448, 15 Navasota First National Bank v. N. W. 545.

McGinty, 29 Tex. Civ. App. 539, ⁹⁰ *Jones v. Collins*, 94 Md. 403, 69 S. W. 495. 51 Atl. 398.

⁸⁹ *Ashcraft v. De Armond*, 44 ⁹¹ *Hopkins v. Wheeler*, 21 R. I. Iowa 229; *Parsons v. Parsons*, 66 533, 79 Am. St. Rep. 819, 45 Atl. Iowa 754, 21 N. W. 570, 24 N. W. 551.

saying that there was nothing about the manner of the person whose condition is in question denoting insanity. In such a case, merely denying the existence of irrational conduct should be sufficient, the witness being otherwise qualified.⁹² And if facts are not stated, the witness having testified that the person was sane, the error, if any, is slight.⁹³

§ 388. Distinction Between Statements of Fact and of Opinion Is Often Slight.

The difference between fact and opinion is often very slight. Thus although a non-expert witness may not give his opinion as to the testator's sanity or insanity except in the instance before stated, yet testimony that the witness had noticed "no incoherence of thought," and nothing "unusual or singular," in the testator's mental condition, was held admissible as relating to a fact, not an opinion.⁹⁴ Characterizing the acts and declarations of a testator as "rational," or "irrational," has been held to refer merely to matters of fact.⁹⁵ Where the issue is as to whether testamentary capacity has been impaired or

⁹² Parrish v. State, 139 Ala. 16, 36 So. 1012; Herndon v. State, 111 Ga. 178, 36 S. E. 634.

⁹³ State v. Soper, 148 Mo. 217, 49 S. W. 1007; State v. Holloway, 156 Mo. 222, 56 S. W. 734.

The opinion of the witness must be directed to the time when the will was made. It might not be serious error if the opinion was directed to proof of capacity, yet it might be serious error if it was directed to proof of incapacity.—Jones v. Collins, 94 Md. 403, 51 Atl. 398.

⁹⁴ Nash v. Hunt, 116 Mass. 237. See, also, May v. Bradlee, 127 Mass. 414.

In Massachusetts, witnesses who are neither experts nor subscribing witnesses, can not state their opinions as to the sanity of the testator.—Hastings v. Rider, 99 Mass. 622; Cowles v. Merchants, 140 Mass. 377, 5 N. E. 288; Smith v. Smith, 157 Mass. 389, 32 N. E. 348.

⁹⁵ Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Rider v. Miller, 86 N. Y. 507.

destroyed by sickness, a non-expert who was well acquainted with the testator both in sickness and health may be allowed to testify that he saw no difference in his mental condition in sickness or in health. Such an answer is a statement of fact, not an opinion.⁹⁶ Evidence that a person acted strangely or in a childish manner is a matter of fact and may be testified to by any one;⁹⁷ and the question as to whether or not the testator was an eccentric man is not objectionable as calling for a conclusion.⁹⁸

§ 389. Trial Court Must Determine Qualifications of Witness to Express an Opinion.

It must necessarily be left to the discretion of the probate court as to whether or not there is a fair basis for the opinion of a non-expert witness. The court must determine whether a given witness has the qualifications which would authorize a statement by him of his opinion as to the mental capacity of the testator. The re-

⁹⁶ *Severin v. Zack*, 55 Iowa 28, 7 N. W. 404; *Kosteletzky v. Scherhart*, 99 Iowa 120, 68 N. W. 591; *Hertrich v. Hertrich*, 114 Iowa 643; 89 *Am. St. Rep.* 389, 87 N. W. 689.

Testimony of witnesses, who had a greater or less degree of intimacy or acquaintance with the deceased, in answer to questions that do not call for an opinion as to mental sanity, but as to how the deceased appeared to them, is admissible.—*Estate of Keithley*, 134 Cal. 9, 13, 66 Pac. 5.

A statement that a person appeared rational or irrational is one of fact resulting from observa-

tion, and is not an opinion as to sanity.—*People v. Manoogian*, 141 Cal. 592, 595, 75 Pac. 177.

⁹⁷ *Parsons v. Parsons*, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564.

⁹⁸ *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882. See, also, *In re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

Asking the witness to state if he had observed in the testatrix "any peculiarities of manner, speech or conduct," and the witness answering "no," it was held that the question did not call for the opinion of the witness, but for a fact.—*Hogan v. Roche's Heirs*, 179 Mass. 510, 61 N. E. 57.

sponsibility of the determination of this question is with the judge presiding at the trial, who, having a comprehensive view of the issues and the evidence produced and having the witness before him, must determine the question as to the propriety of opinion evidence.⁹⁹ His ruling on the question will not be disturbed on appeal unless there was a clear abuse of discretion.¹ In a clear case, however, it is the duty of the appellate court to review the determination of the trial court and to correct any error that may have occurred. For instance, if it should appear that the witness had never spoken to the testator nor seen any significant act, but had merely observed him driving from day to day through the streets, it would be a plain abuse of judicial discretion to admit in evidence the opinion of such a witness as to the sanity of the testator. Again, if the witness for years had been in constant communication with the testator, had frequently conversed with him and observed his conduct from day to day, the exclusion of the opinion of

⁹⁹ *Turner v. American Security & Trust Co.*, 213 U. S. 257, 53 L. Ed. 788, 29 Sup. Ct. Rep. 420; *Parrish v. State*, 139 Ala. 16, 36 So. 1012; *Estate of Carpenter*, 94 Cal. 406, 29 Pac. 1101; *Huyck v. Rennie*, 151 Cal. 411, 90 Pac. 929; *In re Budan's Estate*, 156 Cal. 230, 104 Pac. 443; *Matter of Hull*, 117 Iowa, 738, 89 N. W. 979; *Durant v. Whitchee*, 97 Kan. 603, 156 Pac. 739; *Clarke v. Irwin*, 63 Neb. 539, 88 N. W. 783; *Nashville, etc., R. Co. v. Brundige*, 114 Tenn. 31, 4 Ann. Cas. 887, 84 S. W. 805.

¹ *Huyck v. Rennie*, 151 Cal. 411, 90 Pac. 929; *In re Budan's Estate*, 156 Cal. 230, 104 Pac. 443.

The opinion of the stepson of the testatrix, who had known her intimately for years and visited her on the date when the will was made, was properly admitted in evidence.—*Barnett v. Freeman*, (Ala.) 72 So. 395.

A trained nurse who attended the testator for three days prior to his death, and was in his room every hour of the day during that period, may be held to be an intimate acquaintance within the meaning of the statute permitting intimate acquaintances to give their opinion as to soundness of mind.—*In re Budan's Estate*, 156 Cal. 230, 104 Pac. 442.

such a witness would be erroneous and would be corrected on appeal.²

§ 390. Privileged Communications: Waived as to Subscribing Witnesses.

At common law, communications to an attending physician from a patient were not privileged;³ but now, in most jurisdictions, statutes are in force which prevent a physician, against the will of his patient, from disclosing any information which he acquired in his professional capacity while the relation of physician and patient existed.⁴ The general rule is that the information which is thus privileged is that which it was necessary for the physician to acquire in order to properly treat the patient, and a wide range is given to the information which may be asked for and obtained by the physician.⁵ All communications made by a client to his attorney for

² *Turner v. American Security & Trust Co.*, 213 U. S. 257, 53 L. Ed. 788, 29 Sup. Ct. Rep. 420.

³ *Rex v. Gibbons*, 1 Car. & P. 97; *Broad v. Pitt*, 3 Car. & P. 518; *Wheeler v. Le Marchant*, 17 Ch. Div. 675; *Springer v. Byram*, 137 Ind. 15, 45 Am. St. Rep. 159, 23 L. R. A. 244, 36 N. E. 361; *Winters v. Winters*, 102 Iowa 53, 63 Am. St. Rep. 428, 71 N. W. 184; *Campau v. North*, 39 Mich. 606, 33 Am. Rep. 433.

⁴ *Dreier v. Continental Ins. Co.*, 24 Fed. 670; *Connecticut Mutual Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 28 L. Ed. 708, 5 Sup. Ct. Rep. 119; *Freel v. Market St. Cable R. Co.*, 97 Cal. 40, 31 Pac. 730; *Lissak v. Crocker Estate Co.*,

119 Cal. 442, 51 Pac. 688; *Springer v. Byram*, 137 Ind. 15, 45 Am. St. Rep. 159, 23 L. R. A. 244, 36 N. E. 361; *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523; *Jones v. Preferred Bankers' L. & Assur. Co.*, 120 Mich. 211, 79 N. W. 204; *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564; *Westover v. Aetna Life Ins. Co.*, 99 N. Y. 56, 52 Am. Rep. 1, 1 N. E. 104.

⁵ *Matter of Redfield*, 116 Cal. 637, 48 Pac. 794; *Pennsylvania Co. v. Marion*, 123 Ind. 415, 18 Am. St. Rep. 330, 7 L. R. A. 687, 23 N. E. 973; *Feeney v. Long Island R. Co.*, 116 N. Y. 375, 5 L. R. A. 544, 22 N. E. 402; *In re Bruendl*, 102 Wis. 45, 78 N. W. 169.

the purpose of securing legal advice or aid are privileged. This was the rule of the common law and has been expressly enacted by statute in practically all jurisdictions.⁶ An exception to the rule, however, is when third persons are present. Thus, if a client communicates to his attorney in the presence and hearing of third persons, the privilege is waived,⁷ and the same rule applies to a conversation between the client and others in the presence of the attorney.⁸ When a will is executed and other persons are present, as witnesses or otherwise, and overhear all the conversation which takes place between the testator and his legal or medical adviser, such fact constitutes a waiver as to privileged communications and the physician or attorney may be called upon to relate what occurred at the execution of the will.⁹ And where the testator calls upon his physician or his attor-

⁶ *Turquand v. Knight*, 2 M. & W. 98; *Richards v. Jackson*, 18 Ves. Jun. 472, 474; *Montgomery v. Perkins*, 94 Fed. 23; *Eldridge v. State*, 126 Ala. 63, 28 So. 580; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Hollenback v. Todd*, 119 Ill. 543, 8 N. E. 829; *Doherty v. O'Callaghan*, 157 Mass. 90, 34 Am. St. Rep. 258, 17 L. R. A. 188, 31 N. E. 726; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874; *Koeber v. Somers*, 108 Wis. 497, 52 L. R. A. 512, 84 N. W. 991.

⁷ *Weeks v. Argent*, 16 M. & W. 817; *Ruiz v. Dow*, 113 Cal. 490, 45 Pac. 867; *Stone v. Minter*, 111 Ga. 45, 50 L. R. A. 356, 36 S. E. 321; *Tyler v. Tyler*, 126 Ill. 525, 9 Am. St. Rep. 642, 21 N. E. 616; *Scott v. Aultman Co.*, 211 Ill. 612, 103 Am.

St. Rep. 215, 71 N. E. 1112; *Denunzio v. Scholtz*, 117 Ky. 182, 4 Ann. Cas. 529, 77 S. W. 715; *Elliott v. Elliott*, 3 Neb. Unof. 832, 92 N. W. 1006; *Matter of Smith*, 61 Hun (N. Y.) 101, 15 N. Y. Supp. 425; *Hummel v. Kistner*, 182 Pa. St. 216, 37 Atl. 815.

⁸ *Murphy v. Waterhouse*, 113 Cal. 467, 54 Am. St. Rep. 365, 45 Pac. 866; *Allen v. Morgan*, 61 Ga. 107; *Scott v. Aultman Co.*, 211 Ill. 612, 103 Am. St. Rep. 215, 71 N. E. 1112; *Brennan v. Hall*, 131 N. Y. 160, 29 N. E. 1009.

⁹ *In re Coleman*, 111 N. Y. 220, 19 N. E. 71; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874; *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828, 55 N. W. 149.

ney to be a subscribing witness to his will, that act is a waiver of the privilege and invites full and proper examination of matters and facts regarding which their lips otherwise would have been sealed.¹⁰

§ 391. The Same Subject: Who May Claim or Waive the Privilege.

It is the general rule that where there has been no waiver of the privilege by the testator during his life, his personal representatives may, in contests with third persons, claim the privilege;¹¹ nor in such a case can the privilege be waived by third parties.¹² The decisions, however, are not harmonious in those cases where the testamentary capacity of the testator is involved in a will contest. The cases are principally in respect to the physician who attended the deceased. Under those statutes which prohibit a physician from testifying as to privileged matters except with the consent of the patient, it is held that after such patient's death the lips of the physician are sealed and that the privilege can not be

¹⁰ *In re Wax's Estate*, 106 Cal. 343, 39 Pac. 624; *In re Mullin's Estate*, 110 Cal. 252, 42 Pac. 645; *Denning v. Butcher*, 91 Iowa 425, 59 N. W. 69; *Worthington v. Klemm*, 144 Mass. 167, 10 N. E. 522; *Doherty v. O'Callaghan*, 157 Mass. 90, 34 Am. St. Rep. 258, 17 L. R. A. 188, 31 N. E. 726; *Elliott v. Elliott*, 3 Neb. Unof. 832, 92 N. W. 1006; *Sheridan v. Houghton*, 16 Hun (N. Y.) 628; *Matter of Coleman*, 111 N. Y. 220, 19 N. E. 71; *McMaster v. Scriven*, 85 Wis.

162, 39 Am. St. Rep. 828, 55 N. W. 149; *In re Downing*, 118 Wis. 581, 95 N. W. 876.

¹¹ *Emmons v. Barton*, 109 Cal. 662, 670, 42 Pac. 303; *Heuston v. Simpson*, 115 Ind. 62, 7 Am. St. Rep. 409, 17 N. E. 261; *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185.

¹² *Matter of Nelson*, 132 Cal. 182, 64 Pac. 294; *Gurley v. Park*, 135 Ind. 440, 35 N. E. 279; *Groll v. Tower*, 85 Mo. 249, 55 Am. Rep. 358; *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320.

waived either by the heirs or personal representatives of the deceased.¹³

In many jurisdictions, however, and it may be stated as the general rule, the heirs at law or personal representatives of a decedent may waive the privilege in a contest involving the validity of his will, and if the contest is between the heirs and personal representatives of the decedent there is no objection to a physician being called and allowed to testify for either side.¹⁴ The same rule

¹³ *In re Flint's Estate*, 100 Cal. 391, 34 Pac. 863; *In re Redfield's Estate*, 116 Cal. 637, 48 Pac. 794; *Harrison v. Sutter St. R. Co.*, 116 Cal. 156, 47 Pac. 1019; *Estate of Black*, 132 Cal. 392, 396, 64 Pac. 695. See, also, *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320; *Matter of Coleman*, 111 N. Y. 220, 19 N. E. 71, *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874; *Hoyt v. Hoyt*, 112 N. Y. 493, 20 N. E. 402; *Auld v. Cathro*, 20 N. D. 461, 128 N. W. 1025; *In re Van Alstine's Estate*, 26 Utah 193, 72 Pac. 942; *In re Hunt's Will*, 122 Wis. 460, 100 N. W. 874.

Where the statute prohibits a husband or wife from being examined as to any communication made by one to the other while married, or after the marriage relation has ceased to reveal in testimony any such communication, held to absolutely close the mouth of a surviving husband or wife after the death of the other, such communications being privileged, which privilege can not be waived by one party alone, and that death

does not remove the disability.—*Hertrich v. Hertrich*, 114 Iowa 643, 89 Am. St. Rep. 389, 87 N. W. 689; citing *O'Connor v. Marjoribanks*, 4 Man. & Gr. 435.

¹⁴ *In re Shapter's Estate*, 35 Colo. 578, 117 Am. St. Rep. 216, 6 L. R. A. (N. S.) 575, 85 Pac. 688; *Russell v. Jackson*, 9 Hare 387; *Olmstead v. Webb*, 5 App. Cas. (D. C.) 38; *Morris v. Morris*, 119 Ind. 341, 21 N. E. 918; *Winters v. Winters*, 102 Iowa 53, 63 Am. St. Rep. 428, 71 N. W. 184; *Kirsher v. Kirsher*, 120 Iowa 337, 94 N. W. 846; *Long v. Garey Investment Co.*, (Iowa) 110 N. W. 26; *Fraser v. Jennison*, 42 Mich. 206, 209, 3 N. W. 882; *Groll v. Tower*, 85 Mo. 249, 55 Am. Rep. 358; *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510; *In re Gray's Estate*, 88 Neb. 835, Ann. Cas. 1912B, 1037, 33 L. R. A. (N. S.) 319, 130 N. W. 746. See, also, *Doherty v. O'Callaghan*, 157 Mass. 90, 34 Am. St. Rep. 258, 17 L. R. A. 188, 31 N. E. 726; criticizing *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874.

has been applied to attorneys.¹⁵ One reason which has been given for the rule is that the personal representatives or heirs represent the estate of the testator. This is true as to the property of the estate, but it can not be said to be true as to the person or character of the decedent.¹⁶ But the waiver of the privilege should be for the benefit of the estate and to conserve its interests; thus a personal representative could not waive the privilege in an action brought to remove him.¹⁷ The rule as to privileged communications does not apply where a

The rule in New York is that in a case where the validity of the will of a testator is in question and the executor named in the will, or the widow of the testator, or any of his heirs, next of kin, or other party in interest, have waived the privilege, the physician who had attended the deceased testator may testify as to facts regarding the mental or physical condition of the decedent, acquired while attending him in a professional capacity, excepting confidential communications and such facts as would tend to disgrace the memory of the deceased.—N. Y. Code Civ. Proc., 1901, § 836.

In a suit to establish the validity of the probate of a will, where the contesting defendants waived the provisions of the code providing that a physician could not testify as to privileged matters, it was held the defendants were entitled to call a physician and have him testify as to the physical condition of the testator at a certain

time.—*Roche v. Nason*, 185 N. Y. 128, 77 N. E. 1007.

¹⁵ *Fossler v. Schriber*, 38 Ill. 172; *Wilkinson v. Service*, 249 Ill. 146, *Ann. Cas.* 1912A, 41, 94 N. E. 50; *Winters v. Winters*, 102 Iowa 53, 63 *Am. St. Rep.* 428, 71 N. W. 184; *Bannon v. Bannon Sewer Pipe Co.*, 136 Ky. 556, 119 S. W. 1170, 124 S. W. 843; *Appeal of Le Prohon*, 102 Me. 455, 10 *Ann. Cas.* 1115, 67 *Atl.* 317; *Brooks v. Holden*, 175 Mass. 137, 55 N. E. 802; *Phillips v. Chase*, 201 Mass. 444, 131 *Am. St. Rep.* 406, 87 N. E. 755; *In re Parker's Estate*, 78 Neb. 535, 111 N. W. 119; *In re Young's Estate*, 33 Utah 382, 126 *Am. St. Rep.* 843, 14 *Ann. Cas.* 596, 17 *L. R. A.* (N. S.) 108, 94 *Pac.* 731.

¹⁶ *Westover v. Aetna Life Insurance Co.*, 99 N. Y. 56, 52 *Am. Rep.* 1, 1 N. E. 104.

¹⁷ *Scott v. Smith*, 171 Ind. 453, 85 N. E. 774. As to a contestant not being entitled to waive the privilege, see, *In re Mansbach's Estate*, 150 Mich. 348, 114 N. W. 65.

physician examines a testator for the purpose of thereafter becoming a witness as to his mental capacity; such examination does not preclude him from thereafter testifying without the privilege being waived.¹⁸

§ 392. The Same Subject: Contest Between Heirs and Next of Kin.

Where there has been no waiver of privileged communications by the testator during his lifetime, the decisions are not harmonious as to the extent to which either the attorney or the physician of the deceased may be allowed to testify. A distinction has been drawn between the case of a contest of the will between the heirs and next of kin, and one where a third party has instituted an action against the estate. In the former instance it is said that the attorney who drew the will of the testator may be allowed to testify as to communications made concurrently to him by the testator upon such subject. In such a case the testimony of the attorney need not be withheld for the protection of his client; if the testator's purpose was illegal, that would not be a ground for applying the rule as to privileged communications, and if the purpose was lawful, it should be to the interest of the testator that disclosures which he made regarding his will should be introduced to sustain it. Such reasoning, however, would not apply to property of which the testator had never assumed title and which was claimed by others.¹⁹

¹⁸ Chicago I. & L. R. Co. v. Gorman, 47 Ind. App. 432, 94 N. E. 730.

¹⁹ Blackburn v. Crawfords, 3 Wall. (U. S.) 175, 193, 18 L. Ed. 186.

"In a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communi-

§ 393. The Same Subject: Claiming Privilege Is Not Suppression of Evidence.

Privileged communications are made inadmissible in evidence for reasons of general public policy. Claiming the privilege is not to be construed as a suppression of evidence, and the opposing side would not be entitled to an instruction to that effect.²⁰

§ 394. Burden of Proof: Term Defined.

The question as to the burden of proof in will contests involving the testamentary capacity of the testator has been a fertile subject for discussion. The decisions are almost hopelessly at variance, in many instances due to the application of the underlying principles and presumptions, in others because of the decisions having been written with only the facts of the particular case in view, and statements have been unguardedly made. The manner in which the term "burden of proof" has sometimes been employed has led to confusion. It has, as used in the decisions, two distinct meanings. In one instance it is applied to the plaintiff in an action upon whom the burden is first imposed to establish a *prima facie* case; again, it is sometimes used with reference to the requirement that the defendant, after a *prima facie* case has been established against him, come forward with his proofs and rebut the evidence presented. The instance last mentioned is often referred to as a case where the burden of proof has shifted. In some decisions, the language of

cations might be privileged, if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the

heirs or next of kin."—Glover v. Patten, 165 U. S. 394, 406, 41 L. Ed. 760, 17 Sup. Ct. 411. See, also, Russell v. Jackson, 9 Hare 387.

²⁰ Thomas v. Gates, 126 Cal. 1, 6, 58 Pac. 315.

the opinion has referred to still a further instance, such as where the defendant has produced evidence which defeats the case of the plaintiff, it then being said that the burden has shifted back upon the plaintiff to counteract the evidence introduced by the defendant. Such instances, however, have reference to the *weight of the evidence* which may shift from side to side as a case progresses. The *burden of proof*, strictly speaking, has reference to the duty imposed upon a moving party to establish his cause by a preponderance of the evidence; and although the weight of the evidence introduced by the opposing sides may shift from one to another according as it is introduced in support of various contentions, yet the burden of proof never shifts. The general rule in civil matters is that upon the final submission of the issue to the court or jury, viewing the matter in its entirety, the plaintiff or moving party, if successful, must have established his case by a preponderance of the evidence.²¹

§ 395. The Term "Burden of Proof" as It Has Been Applied in Will Contests.

In a will contest the proponent may establish a *prima facie* case by showing the age and testamentary capacity of the testator and the due execution of the will. To

²¹ Scott v. Wood, 81 Cal. 398, 22 Pac. 871; Heinemann v. Heard, 62 N. Y. 448, 455; Farmers' L. & T. Co. v. Siefke, 144 N. Y. 354, 39 N. E. 358.

"The burden of proof and the weight of evidence are two different things. The former remains on the party affirming a fact in support of his case, and

does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established."—Central Bridge Corp. v. Butler, 2 Gray (Mass.) 132.

rebut such evidence the contestant may show that both before and after the making of the will the testator was afflicted with chronic or habitual insanity. Such mental incapacity being shown, aided by the presumption that it continues, it may be said that there is a burden imposed on the proponent to prove that the will was made during a lucid interval.²² The language of the various decisions often, in cases such as the above, refers to a shifting of the burden of proof. But in spite of all reasoning, the opinions of the various courts in a large measure can not be reconciled.

22 Even one furiosus; or mad, or in other words lunatic, may in a lucid interval make his last will and testament. Where an insane condition is established, the burden is, however, on proponents to show with great particularity that a will of such a person was made in a lucid interval. When the testator was not furiosus, or lunatic, but was at the time deprived of reason by illness, the principle is the same.—*In re Schmidt's Will*, 139 N. Y. Supp. 464, 477; *Brogden v. Brown*, 2 Addams Ecc. 441; *Kemble v. Church*, 3 Hagg. Ecc. 273. See, ante, §§ 337, 338, as to lucid intervals.

When a will is propounded for probate, no general duty devolves on the proponent to make proof in the first instance of the sanity of the testator at the time of making the will. . . . When a will is contested on the ground of

mental incapacity, the burden of proof is on the contestant. . . . The contestant fulfills this requirement as to the burden of proof when he establishes lunacy at a time prior to the making of the will. As the presumption is that lunacy, once established, continues, if it is alleged in such case that the will was made during a lucid interval, the burden of proof attaches to the party alleging such lucid interval, who must show sanity and competency at the particular period. In order, however, to shift the burden of proof on the proponent to show that the will was made during a lucid interval, the contestant must establish habitual and fixed insanity. Occasional fits, or aberrations of mind produced by temporary causes, are not sufficient.—*O'Donnell v. Rodiger*, 76 Ala. 222, 52 Am. Rep. 322.

§ 396. All Persons Are Presumed of Sound Mind, in Absence of Evidence to the Contrary.

When a will is offered for probate, the first presumption is in favor of the validity of the instrument, due compliance with all statutory formalities being shown. This follows from the well settled rule that in the absence of evidence to the contrary, every human being is presumed to be of sound mind.²³ This presumption exists generally, but is not applied with the same force in all cases.²⁴ A converse of the rule is that testamentary incapacity is never presumed, and the burden of showing insanity or lack of mental competency is upon the contestant.²⁵ Then

23 *Councill v. Mayhew*, 172 Ala. 295, 55 So. 314; *Bims v. Collier*, 69 Ark. 245, 62 S. W. 593; *Estate of Nelson*, 132 Cal. 182, 64 Pac. 294; *Estate of Dolbeer*, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695; *Estate of Johnson*, 152 Cal. 778, 93 Pac. 1015; *Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597; *Estate of Loveland*, 162 Cal. 595, 123 Pac. 801; *Estate of MacCrellish*, 167 Cal. 711, L. R. A. 1915A, 443, 141 Pac. 257; *Estate of Clark*, 170 Cal. 418, 149 Pac. 828; *Estate of Martin*, 170 Cal. 657, 151 Pac. 138; *Rodney v. Burton*, 4 Boyce (27 Del.) 171, 86 Atl. 828; *Carpenter v. Calvert*, 83 Ill. 62; *Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285; *Entwistle v. Meikle*, 180 Ill. 9, 54 N. E. 217; *Norton v. Clark*, 253 Ill. 557, 97 N. E. 1079; *Achey v. Stephens*, 8 Ind. 411; *Bramel v. Bramel*, 101 Ky. 64, 39 S. W. 520; *Rice v. Key*, 138 La. Ann. 483, 70 So. 483; *Turner v. Rusk*, 53 Md.

65; *Lyon v. Townsend*, 124 Md. 163, 91 Atl. 704; *Byrne v. Byrne*, (Mo.) 181 S. W. 391; *Rintelen v. Schaefer*, 158 App. Div. 477, 143 N. Y. Supp. 631; *In re Craven's Will*, 169 N. C. 561, 86 S. E. 587; *Clark's Heirs v. Ellis*, 9 Ore. 128; *In re McNitt's Estate*, 229 Pa. St. 71, 78 Atl. 32; *Wooddy v. Taylor*, 114 Va. 737, 77 S. E. 498.

The presumption is, in the absence of pleading and evidence on that subject, that the common law as to testamentary capacity prevails in a foreign state.—*Long v. Dufer*, 58 Ore. 162, 113 Pac. 59.

In Maine it has been held that there is no presumption of testamentary capacity. It consequently follows that it is necessary for the proponent to establish that fact.—*Gerrish v. Nason*, 22 Maine 438, 39 Am. Dec. 589.

²⁴ See, post, §§ 399, 400.

²⁵ Testamentary incapacity is not to be presumed, but must be

we also have the presumption that one proved to have once been afflicted with chronic insanity is presumed to have continued to be so afflicted until the contrary is proven.²⁶

§ 397. Presumptions and Suspicious Circumstances.

The presumption that all men are of sound mind is the basis of many decisions. Where the proponent has established a *prima facie* case, which includes proof of competency, it is necessarily incumbent on the contestant to introduce evidence to counteract such showing. The extent of such evidence, however, necessarily varies. The presumption of testamentary capacity prevails only in the absence of proof to the contrary. The language or the provisions of the will might be such as to excite suspicion as to the mental competency of the testator. No court would be justified, should the language or provisions of the testament be irrational, or should the dispositions made or the circumstances surrounding the execution of the instrument excite suspicion, in admitting the will to probate unless evidence be introduced to explain the language or remove the suspicion.²⁷

satisfactorily shown to the jury by the preponderance or greater weight of the insanity in the case. —Rodney v. Burton, 4 Boyce (27 Del.) 171, 86 Atl. 828; Carpenter v. Calvert, 83 Ill. 62; Taylor v. Pegram, 151 Ill. 106, 37 N. E. 837; Egbers v. Egbers, 177 Ill. 82, 50 N. E. 285; Entwistle v. Meikle, 180 Ill. 9, 54 N. E. 217; Norton v. Clark, 253 Ill. 557, 97 N. E. 1079; Pepper v. Martin, 175 Ind. 580, 92 N. E. 777; Stephenson v. Stephenson, 62 Iowa 163, 166, 17 N. W.

456; Beebe v. McFaul, 125 Iowa 514, 101 N. W. 267; Philpott v. Jones, 164 Iowa 730, 146 N. W. 860; Taylor v. Wilburn, 20 Mo. 306, 64 Am. Dec. 186; Jackson v. Van Dusen, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; In re Gedney's Will, 142 N. Y. Supp. 157, 161; Mordecai v. Canty, 86 S. C. 470, 68 S. E. 1049.

²⁶ See, ante, §§ 333, 334.

²⁷ At common law one who relied on a will in opposition to the title of the heir had to allege that

Although the burden of proving testamentary incapacity may rest on the contestant, yet if he established the fact that the testator had been afflicted with habitual insanity, the weight of the evidence has shifted in his favor, and it is then necessary for the proponents to show, by testimony as strong as that required to establish the insanity, that it did not exist at the time the will was made.²⁸

it was the will of a person of sound and disposing mind and therefore prove it. This is a very wise and profound rule of testamentary common law. The consequence of it is that in case of doubt the presumption is against the will. In *Tyrrell v. Painton*, (1894) *Probate*, 151, 156, it was said: "Whenever suspicious circumstances exist which excite the suspicion of the court, it is for those who propound the will to remove such suspicion, and it is only when this is done that the onus is thrown on those who oppose the will."—In *re Gedney's Will*, 142 *N. Y. Supp.* 157, 172; *Sutton v. Sadler*, 3 *C. B. (N. S.)* 87.

The burden shifts also on showing a fiduciary or confidential relation between the testator and a principal beneficiary.—*Turner v. Butler*, 253 *Mo.* 202, 161 *S. W.* 745; *Balak v. Susanka*, 182 *Mo. App.* 458, 168 *S. W.* 650.

If the testator had been suffering from some infirmity, something more is required than the proof of due execution of the will.

—*Herbert v. Berrier*, 81 *Ind.* 1; *Greenwood v. Cline*, 7 *Ore.* 17; *Hyatt v. Lunnin*, 1 *Demarest (N. Y.)* 14; *Bartee v. Thompson*, 8 *Baxt.* (67 *Tenn.*) 508.

Compare: *Frear v. Williams*, 7 *Baxt.* (66 *Tenn.*) 550; *Key v. Holloway*, 7 *Baxt.* (66 *Tenn.*) 575.

²⁸ *Rodney v. Burton*, 4 *Boyce (27 Del.)* 171, 86 *Atl.* 828.

While a will proved to have been executed and attested as prescribed by law is presumed to have been made by a person of sound mind, if testimony is introduced which counterbalances that presumption, the party seeking to support such will must show by affirmative evidence that the testator was of sound mind at the time he executed the will.—*J. J. Smith Lumber Co. v. Scott County Garbage etc. Co.*, 149 *Iowa* 272, 30 *L. R. A. (N. S.)* 1184, 128 *N. W.* 389.

The presumption of the law is in favor of testamentary capacity and those who insist on the contrary have the burden of proof. They may shift the burden by showing that insanity existed

§ 398. Distinction Where Will Is Prepared by Testator, or Under Supervision of Principal Beneficiary.

Where a testator writes or dictates his will, which is rational in form and in substance, such fact is strongly in favor of his mental competency.²⁹ But where one who prepares the instrument or superintends its execution is himself a beneficiary under the will, his conduct must be viewed and scrutinized as that of an interested party. It is said that "propriety and delicacy would infer that he should not conduct the transaction; and, *a fortiori*, in a case where he is the confidential attorney of the deceased, and where the benefit conferred is to a consid-

prior to the making of the disputed paper. After such proof the preponderance must show that the execution of the will was during a lucid interval.—*Elkinton v. Brick*, 44 N. J. Eq. 154, 1 L. R. A. 161, 15 Atl. 391.

In *Attorney-General v. Parnter*, 3 Bro. C. C. 441, the Lord Chancellor says: "If derangement be alleged, it is clearly incumbent upon the party alleging it, to prove such derangement: if such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burden of proof attaches to the party alleging such lucid interval, who must show sanity and competency at the period when the act was done, and to which the lucid interval refers."

See, also, *ex parte Holyland*, 11 Ves. Jun. 10; *Prinsep and The East India Co. v. Dyce Sombre*, 10 Moore P. C. C. 232.

The rule does not apply to cases of mere intermittent or occasional insanity.—In *re Murphy's Estate*, 43 Mont. 353, Ann. Cas. 1912C, 380, 116 Pac. 1009.

See, ante, § 333, as to presumption of continuance of insanity.

§§ 333-336, as to adjudication of incompetency.

§§ 337, 338, as to lucid intervals.

²⁹ In *re Crandall's Appeal*, 63 Conn. 365, 38 Am. St. Rep. 375, 28 Atl. 531; *Bever v. Spangler*, 93 Iowa 576, 61 N. W. 1072; *Spratt v. Spratt*, 76 Mich. 384, 43 N. W. 627.

See, ante, § 353, as to the effect of unreasonable prejudices and animosities.

See, ante, §§ 354, 355, as to the consideration of the provisions of the will.

erable amount.”³⁰ In such a case the burden of proof would be on the proponent to establish the testamentary act with greater particularity than would be required where the will was prepared by and executed in the presence of disinterested persons.³¹

§ 399. Proponent Should Establish His Prima Facie Case by Proof of Testamentary Capacity: Conflict of Authority

In most jurisdictions it is the common practice when a will is offered for probate to commence with the formal proof of execution.³² But even this is not always the rule, for in some states, upon the filing of a contest, the probate proceedings are stayed and the trial of the issues presented by the contest is first had, the contestant acting as the plaintiff in such matter. In such a case, the lack of testamentary capacity of the testator or the non-execution of the instrument being the issue, the contes-

³⁰ *Paske v. Ollat*, 2 Phillim. 323.

³¹ *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235; *Post v. Mason*, 91 N. Y. 539, 43 Am. Rep. 689; *Matter of Mondorf*, 110 N. Y. 450, 456, 18 N. E. 256; *In re Gedney's Will*, 142 N. Y. Supp. 157, 176.

³² *O'Donnell v. Rodiger*, 76 Ala. 222, 52 Am. Rep. 322; *McCarthy v. Weber*, 96 Kan. 415, 151 Pac. 1103.

The proponent of a will on an issue of the testator's capacity first proceeds to establish the factum of the will by making out, either through the testimony of the attesting witnesses to the will, or otherwise, in a proper case, the due execution of the tes-

tamentary paper in conformity with the statute of wills, and also the testator's capacity to testamentate and freedom from restraint. Then a contestant proceeds to present or give in his evidence in support of the written allegations interposed to the petition for probate. When the contestant rests, the proponent again goes forward, and offers his ad-minicular proofs, or, in other words, his additional evidence in support of the will.—*In re Gedney's Will*, 142 N. Y. Supp. 157, 160, 161; *Matter of Sperb*, 71 Misc. Rep. 378, 130 N. Y. Supp. 122.

tant must first present his proofs before the proponent is called upon to offer any evidence in support of the will.³³

The general practice is for the proponent to first establish a *prima facie* case. He shows the due execution of the will.³⁴ The authorities then conflict as to whether or not further evidence must be introduced to establish testamentary capacity. One line of decisions relies upon the presumption that all human beings, in the absence of evidence to the contrary, are of sound mind, and accepts the presumption as proof of testamentary capacity. Such authorities hold that it is only necessary for the proponent to prove the due execution of the will and to show that all statutory requirements other than testamentary capacity have been fulfilled. The presumption then completes the proof and establishes a *prima facie* case.³⁵

³³ Estate of Latour, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441.

³⁴ O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322; Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691; Bartee v. Thompson, 8 Baxt. (67 Tenn.) 508.

³⁵ O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322; Council v. Mayhew, 172 Ala. 295, 55 So. 314; In re Johnson's Estate, 152 Cal. 778, 93 Pac. 1017; In re Weber's Estate, 15 Cal. App. 224, 114 Pac. 597; Philpott v. Jones, 164 Iowa 730, 146 N. W. 860; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Perkins v. Perkins, 39 N. H. 163; Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691.

In Titlow v. Titlow, 54 Pa. St.

216, 93 Am. Dec. 691, the court says: "It is settled with us, that after proof of the execution of a will by the subscribing witnesses, a plaintiff who sustains a will, may rest on the *prima facie* of his case, and until the will has been assailed, before he calls witnesses to sustain the competency of the testator."

In Perkins v. Perkins, 39 N. H. 163, 167, Bell, C. J., says: "The object of the proceeding is to prove the due execution of a written instrument. . . . The instrument itself must be produced, unless in a few excepted cases where secondary evidence is admitted; and the attesting witnesses must be produced and ex-

§ 400. **The Same Subject: Weight of Authority.**

The weight of authority, however, and the better reasoning are that the proponent of a will must, in the first

aminated, if they are living and within reach of the process of the court. They are to be produced by the party who offers the instrument, or who seeks a decree that it has been proved. . . . The usual formal proof being offered, the law comes in with its presumption that the party is sane, and this presumption stands until evidence is offered tending to raise a different belief. . . . Though ordinarily no question need be asked of the witness, who testifies to the execution of an instrument, relative to the capacity of a grantor, yet, owing to the nature of the proceedings in the case of wills, that the probate of the will is the foundation of the grant of power to the executor to take possession of the estate and the charge of administration, it is, in that case, the long-settled practice of courts of probate to require that the witnesses to wills should be examined as to the fact of the sanity of the testator before the will is established. . . . This practice is equally binding, as the law in such cases, upon the Supreme Court, as on the ordinary courts of probate. . . . It is, therefore, proper to say that the burden of proving the sanity of the testator, and all the other requirements of the law to make a valid will, is upon the party who

asserts its validity. This burden remains upon him till the close of the trial, though he need introduce no proof upon this point until something appears to the contrary."

"The question as to the burden of proof where the issue is testamentary capacity has been a great deal discussed by both judges and text writers and has furnished an occasion for the display of much learning and ingenuity. The numerous decisions upon the subject in this country are in no way uniform and many of them are in direct conflict so that any attempt to reconcile them will be hopeless. They all agree, however, upon the general proposition that sanity is presumed by law, but in some of the states it is held that this general presumption does not apply to last wills and testaments; they form an exception to the rule and that therefore a party propounding a will must not only prove the execution, but must also offer positive proof of capacity. (See *Gerrish v. Nason*, 22 Me. 438, 39 Am. Dec. 589.)

"A different rule, however, is recognized in most of the American courts; that is, that if the presumption of law is in favor of sanity it should be applied to wills as well as to any other instrument in writing. No court requires a

instance, establish his *prima facie* case by proof of the testamentary capacity of the testator. Although, in the absence of evidence to the contrary, all persons are presumed to be of sound mind, and although this presumption may be accepted as a wise and profound rule of testamentary common law, yet it is not sufficient in itself to absolve the proponent from the necessity of proving the testamentary capacity of the testator. It must be remembered that the right to dispose of an estate by will is statutory, and when one relies upon a will in order to gain property in opposition to the heir, it is but just that he should establish the fact that the decedent had testamentary capacity. However wise may be the presumption of soundness of mind, yet the conscience of the court must be satisfied of the mental capacity of the testator, and this the presumption alone is not able to do.³⁶ It is not strictly

party propounding a will to prove the age of the testator until the question is raised upon proof by the contestants."—*Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666.

³⁶*Panton v. Williams*, 2 Curt. 530; *Mountain v. Bennett*, 1 Cox 353; *Comstock v. Hadlyme etc. Soc.*, 8 Conn. 254, 20 Am. Dec. 100; *Sturdevant's Appeal*, 71 Conn. 392, 42 Atl. 70; *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69; *Wells v. Thompson*, 140 Ga. 119, Ann. Cas. 1914C, 898, 47 L. R. A. (N. S.) 722, 78 S. E. 823; *Edenfield v. Boyd*, 143 Ga. 95, 84 S. E. 436; *McFarland v. Morrison*, 144 Ga. 63, 86 S. E. 227; *Penn v. Thurman*, 144 Ga. 67, 86 S. E. 233; *Bullock v. Martin*, 144 Ga. 731, 87 S. E. 1058; *Pepper v. Martin*, 175

Ind. 580, 92 N. E. 777; *Herring v. Watson*, 182 Ind. 374, 105 N. E. 900; *Hospital Co. v. Hale*, 69 Kan. 616, 77 Pac. 537; *McConnell v. Keir*, 76 Kan. 527, 92 Pac. 540; *Gerrish v. Nason*, 22 Maine 438, 39 Am. Dec. 589; *Byrne v. Byrne*, 250 Mo. 632, 157 S. W. 609; *Bensberg v. Washington University*, 251 Mo. 641, 158 S. W. 330; *Turner v. Butler*, 253 Mo. 202, 161 S. W. 745; *Balak v. Susanka*, 182 Mo. App. 458, 168 S. W. 650; *Byrne v. Byrne*, (Mo.) 181 S. W. 391; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; *Kingsley v. Blanchard*, 66 Barb. (N. Y.) 317; *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Matter of Cottrell*, 95 N. Y. 329; *Matter of Martin*, 98 N. Y. 193; *Matter of Lissauer*, 5 N. Y.

a legal presumption; it is more a presumption of fact, an inference to be drawn in the absence of evidence. The law requires that no will be admitted to probate except that of a testator of sound mind, and unless the court is fully satisfied on this point, the instrument should be rejected. It has been claimed that there is an inconsistency in requiring proof of what the law presumes, but it appears better to say that the inference of fact that may be drawn without proof is not sufficient to satisfy the absolute requirement of the statute that no instrument can be the last will of a decedent unless executed when he was of sound mind.

§ 401. Burden of Proof After Proponent Has Established a Prima Facie Case.

A *prima facie* case having been established, including the testamentary capacity of the testator either by actual proof or by the aid of the presumption of competency, we find a divergence of opinion as to upon whom the burden of proof rests. One line of authorities is to the effect that when the proponent has established a *prima facie* case, the burden of proof shifts to the contestant and it is then incumbent upon him to show a want of testamentary capacity;³⁷ while on the other hand we find

Supp. 260; Matter of Goodwin, 95 App. Div. 183, 88 N. Y. Supp. 734; Matter of Schreiber, 112 App. Div. 495, 98 N. Y. Supp. 483; Matter of Gedney, 142 N. Y. Supp. 157, 161; Martin's Will, 82 Misc. Rep. 574, 144 N. Y. Supp. 174, 188; King's Will, 89 Misc. Rep. 638, 154 N. Y. Supp. 238, 245; McDermott's Will, 90 Misc. Rep. 526, 154 N. Y. Supp. 923. See, Delafield v. Parish, 25

N. Y. 9, in which the subject is learnedly discussed.

37 Councill v. Mayhew, 172 Ala. 295, 55 So. 314; Johnston v. Johnston, 174 Ala. 220, 57 So. 450; In re Weber's Estate, 15 Cal. 224, 114 Pac. 597; Wetter v. Habersham, 60 Ga. 193; Credille v. Credille, 123 Ga. 673, 107 Am. St. Rep. 157, 51 S. E. 628; McFarland v. Morrison, 144 Ga. 63, 86 S. E.

a line of decisions which holds that the burden of establishing testamentary capacity always remains with the proponent.³⁸

227; *Carpenter v. Calvert*, 83 Ill. 62; *Wilbur v. Wilbur*, 129 Ill. 392, 21 N. E. 1076; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Craig v. Southard*, 162 Ill. 209, 44 N. E. 393; *Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285; *Waters v. Waters*, 222 Ill. 26, 113 *Am. St. Rep.* 359, 78 N. E. 1; *Norton v. Clark*, 253 Ill. 557, 97 N. E. 1079; *Austin v. Austin*, 260 Ill. 299, *Ann. Cas.* 1914D, 336, 103 N. E. 268; *Pepper v. Martin*, 175 Ind. 580, 92 N. E. 777; *Stephenson v. Stephenson*, 62 Iowa 163, 166, 17 N. W. 456; *Goldthorpe's Estate*, 115 Iowa 430, 88 N. W. 944; *Hull v. Hull*, 117 Iowa 738, 744, 89 N. W. 979; *Beebe v. McFaul*, 125 Iowa 514, 101 N. W. 267; *Ross v. Ross*, 140 Iowa 51, 117 N. W. 1105; *Sevening v. Smith*, 153 Iowa 639, 133 N. W. 1081; *Philpott v. Jones*, 164 Iowa 730, 146 N. W. 860; *Woodford v. Buckner*, 111 Ky. 241, 63 S. W. 617; *Higgins v. Carlton*, 28 Md. 115, 92 *Am. Dec.* 666; *Taff v. Hosmer*, 14 Mich. 309; *Murphy's Estate*, 43 Mont. 353, *Ann. Cas.* 1912C, 380, 116 Pac. 1009; *In re Cherry's Will*, 164 N. C. 363, 79 S. E. 288; *In re Craven's Will*, 169 N. C. 561, 86 S. E. 587; *Titlow v. Titlow*, 54 Pa. St. 216, 93 *Am. Dec.* 691; *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489; *Silverthorn's Will*, 68 Wis. 372, 32 N. W. 287.

38 *Herring v. Watson*, 182 Ind. 374, 105 N. E. 900; *Higdon v. Higdon*, 6 J. J. Marsh (Ky.) 48; *Rogers v. Thomas*, 1 B. Mon. (29 Ky.) 390; *Sheehan v. Kearney*, 82 Miss. 688, 35 L. R. A. 102, 21 So. 41; *Turner v. Butler*, 253 Mo. 202, 161 S. W. 745; *Balak v. Susanka*, 182 Mo. App. 458, 168 S. W. 650; *Byrne v. Byrne*, (Mo.) 181 S. W. 391; *In re King's Will*, 89 Misc. Rep. 638, 154 N. Y. Supp. 238, 245; *In re McDermott's Will*, 90 Misc. Rep. 526, 154 N. Y. Supp. 923; *Hopkins v. Wampler*, 108 Va. 705, 62 S. E. 926. See, also: *Turner v. Cook*, 36 Ind. 129; *Robinson v. Adams*, 62 Me. 369, 16 *Am. Rep.* 473; *Beaubien v. Cicotte*, 8 Mich. 9; *Taff v. Hosmer*, 14 Mich. 309; *Aikin v. Weckerly*, 19 Mich. 482; *Kempsey v. McGinniss*, 21 Mich. 123; *Perkins v. Perkins*, 39 N. H. 163; *Boardman v. Woodman*, 47 N. H. 120, 132; *Mayo v. Jones*, 78 N. C. 402; *Thompson v. Kyner*, 65 Pa. St. 368; *Williams v. Robinson*, 42 Vt. 658, 1 *Am. Rep.* 359.

Compare: *Taylor v. Wilburn*, 20 Mo. 306, 64 *Am. Dec.* 186; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, 4 *Am. Dec.* 330.

The burden of proof always rests on those seeking the probate of the will. — *Crowninshield v. Crowninshield*, 2 Gray (68 Mass.) 524, 532; *Baxter v. Abbott*, 7 Gray

The decisions in some instances may be reconciled through consideration of the distinctions before mentioned; in other cases this is impossible. The opinion of some courts is that the contestant of a will takes the position of a plaintiff in an ordinary action at law, and if testamentary incapacity is alleged, the burden of proof is upon him and he must establish his contention by a preponderance of the evidence. Such is the general rule where the burden of proving mental incapacity is upon the contestant.³⁹ Thus, although it has been held that

(73 Mass.) 71. See, also, *Baldwin v. Parker*, 99 Mass. 79, 84, 96 Am. Dec. 697.

In *Missouri* in the case of *Farrell's Admr. v. Brennen's Admx.*, 32 Mo. 328, 82 Am. Dec. 137, it is held that upon the probate of the will the burden is upon the party seeking to have the will probated, but in a proceeding to contest the validity of the will on the ground of incapacity of the testator, which can only be instituted after the will has been probated, the burden is upon the party attacking the will.

³⁹ *Estate of MacCrellish*, 167 Cal. 711, L. R. A. 1915A, 443, 141 Pac. 257; *In re Barber's Estate*, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973; *Waters v. Waters*, 222 Ill. 26, 113 Am. St. Rep. 359, 78 N. E. 1; *Norton v. Clark*, 253 Ill. 557, 97 N. E. 1079; *In re Murphy's Estate*, 43 Mont. 353, Ann. Cas. 1912C, 380, 116 Pac. 1009.

Upon the trial of an issue arising upon the propounding of a will and a caveat thereto, the bur-

den, in the first instance, is upon the propounder of the alleged will to make out a prima facie case, by showing the factum of the will, and that at the time of its execution the testator apparently had sufficient mental capacity to make it, and in making it, acted freely and voluntarily. When this is done, the burden of proof shifts to the caveator.—*McFarland v. Morrison*, 144 Ga. 63, 86 S. E. 228.

"The law presumes every man to be sane until the contrary is proved, and the burden of proof rests upon the party alleging insanity. But it is incumbent on the proponents of the will to make out a prima facie case in the first instance, by proof of the due execution of the will by the testator, and of his mental capacity, as required by the statute. The burden of proof is then upon the contestants to prove the allegations of their bill, by a preponderance of all the evidence, that the testator was mentally incompetent. The law throws the

the burden of proof, strictly speaking, never shifts, yet the testator being presumed to have been sane, the burden of proof of testamentary incapacity rests throughout on the contestant.⁴⁰ A further distinction has been made that where a will has once been duly proved and

weight of the legal presumption in favor of sanity into the scale in favor of the proponents from which it necessarily results that upon the whole case the burden of proof rests upon the contestants to prove the insanity of the testator."—*Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285.

In *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948, the court commented on the instruction here mentioned, as follows: "The part of said instruction to which objection is urged is as follows: 'If the evidence satisfies you that at any time prior to the execution of said will that John Roller was a person of unsound mind, then the law presumes that that condition of mind continued, unless the mental unsoundness was from some merely temporary or transitory cause; and if the evidence satisfies you that at any time prior to the execution of said will said John Roller was a person of unsound mind, not from a temporary cause, then the burden of showing a return of sanity, or a lucid interval, at the time of the execution of the will, rests upon the defendants, and must be shown by them by a preponderance of the evidence.' This in-

struction, so far as it informed the jury that the burden of proof concerning the unsoundness of mind of the testator at the time of the execution of the will was upon the appellants under the conditions stated, was erroneous. The appellees, by bringing this action to set aside said will and the probate thereof, assumed the burden of showing, by a preponderance of the evidence that the testator did not, at the time the will was executed, have testamentary capacity. It is true that, if unsoundness of mind of a permanent nature has been established by the party having the burden of proof, the presumption is that the same continues until the contrary is shown. But it is equally true that, in order to remove such presumption, the party not having the burden of proof as to such fact or allegation is not required to prove the contrary, by a preponderance of the evidence, but it is sufficient if the scales were equally balanced, so that there is no preponderance either way. In such case the party having the burden of proof can not recover."

⁴⁰ *Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285.

admitted to probate, in an action thereafter attacking the will and seeking to have it set aside on the ground of lack of testamentary capacity, the burden of proof is upon the contesting party.⁴¹

§ 402. Burden of Proof: The Better Rule.

The better rule is that the burden of establishing the validity of a will, including the testamentary capacity of the testator, is always upon the proponent, and although one side or the other may be aided by legal presumptions, and although the weight of the evidence may be in favor of one party at one time and shift to the other party upon further proof being made in his favor, yet upon the conclusion of the testimony, after both sides have rested, it is for the jury to consider all the evidence and to give attention to the legal presumptions under the instructions of the court, and if the proponent has not established the will by a preponderance of the evidence, the verdict should be in favor of the contestant. The evidence may be, and generally is, conflicting. The presumption that the testator had testamentary capacity is entitled to weight; proof that the testator had, prior to the execution of his will, been afflicted with habitual insanity, raises a presumption of continuity which the proponents must rebut; but in the final analysis of the whole case, the better rule is that the burden of establishing the validity of the will by a preponderance of the evidence is upon the proponent.⁴²

⁴¹ *Pepper v. Martin*, 175 Ind. 580, 92 N. E. 777; *Zinkula v. Zinkula*, 171 Iowa 287, 154 N. W. 158.

In *Clapp v. Vatcher*, 9 Cal. App. 462, 99 Pac. 549, it was held that

an order admitting a will to probate is conclusive upon the testamentary capacity of the testator.

⁴² *Buford v. Gruber*, 223 Mo. 231, 253, 122 S. W. 717; *Turner v. Butler*, 253 Mo. 202; 161 S. W.

§ 403. Testamentary Capacity Is a Question of Fact.

The question of testamentary capacity is one for the jury.⁴³ Where there is substantial evidence tending to support the contention of the mental incompetency of the testator, the jury should decide; but, notwithstanding there is some evidence of incapacity, if it lacks substance, the court should not permit the matter to be decided by

745; *Byrne v. Fulkerson*, 254 Mo. 97, 162 S. W. 179; *Balak v. Susanka*, 182 Mo. App. 453, 168 S. W. 656; *In re Martin's Will*, 82 Misc. Rep. 574, 144 N. Y. Supp. 174, 188.

See, ante, §§ 399, 400.

On a preliminary hearing on an application for the probate of a will, under the Kansas statute, the testimony of the subscribing witnesses makes a prima facie case which warrants the admission of the will to probate. In case rebutting evidence and discrediting circumstances are produced as against the prima facie evidence offered by the proponent of the will, the issue must then be determined the same as in any other case.—*McCarthy v. Weber*, 96 Kan. 415, 151 Pac. 1103.

In Missouri it is held that notwithstanding the burden is on the proponent, if the record discloses no substantial evidence of incapacity, a decree in favor of contestant will be reversed.—*Byrne v. Byrne*, (Mo.) 181 S. W. 391.

In Mississippi it is held that the burden of proof as to testamentary

capacity is on the proponents throughout the case. In *Sheehan v. Kearney*, 82 Miss. 688, 35 L. R. A. 102, 21 So. 41, the court said that when the proponent of a will offers the will and the record of its probate, a presumption is thereby raised that the alleged testator had testamentary capacity and this presumption satisfies the burden of proof in that respect, and the contestant must fail unless he overcomes this by proof on his part, but there is no shifting of the burden of proof properly understood.

But there is authority to the effect that where testimony is introduced by the contestant which counterbalances the presumption of mental incapacity, the burden is upon the proponent to show by affirmative evidence that the testator was of sound mind when the will was executed.—*J. J. Smith Lumber Co. v. Scott County Garbage etc. Co.*, 149 Iowa 272, 30 L. R. A. (N. S.) 1184, 128 N. W. 389.

⁴³ *In re Craven's Will*, 169 N. C. 561, 86 S. E. 587.

the jury.⁴⁴ And the finding of the trial court as to testamentary capacity will not be disturbed on appeal where there is a substantial conflict in the evidence, or substantial evidence to support the verdict.⁴⁵

⁴⁴ *Thomasson v. Hunt*, (Mo.) 185 S. W. 165; *Schwilke's Appeal*, 100 Pa. St. 628; *Burden's Will*, 14 Phila. (Pa.) 332; *McPherson's Appeal*, (Pa.) 11 Atl. 205.

Compare: *In re Hardy's Will*, 12 Phila. (Pa.) 22; *In re Colgate's Will*, 12 Phila. (Pa.) 48; *Dyre's Estate*, 12 Phila. (Pa.) 156.

⁴⁵ *In re Weber's Estate*, 15 Cal. App. 224, 114 Pac. 597; *Thomasson v. Hunt*, (Mo.) 185 S. W. 165; *Thomas v. Thomas*, (Mo.) 186

S. W. 993; *In re Noyes' Estate*, 40 Mont. 178, 105 Pac. 1013; *In re Murphy's Estate*, 43 Mont. 353, Ann. Cas. 1912C, 380, 116 Pac. 1009; *Harrison's Appeal*, 100 Pa. St. 458.

As to the probate of a will of personalty being conclusive upon the question of testamentary capacity, see *Noell v. Wells*, 1 Sid. 359; *Vermont Baptist Convention v. Ladd's Estate*, 59 Vt. 5, 9 Atl. 1.

CHAPTER XVI.

SIGNATURE OF THE TESTATOR.

- § 404. Statutory formalities as to execution are mandatory.
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- § 439. Power of appointment executed by will.
- § 440. The same subject: Formalities required.
- § 441. The same subject: Effect of the Statute of Wills of 1 Victoria, ch. 26.
- § 442. The same subject: Time of execution.

§ 404. Statutory Formalities as to Execution Are Mandatory.

The right of making a testamentary disposition of property is statutory; it depends on the will of the legislature, and no hardship is imposed if the power granting the right prescribes mandatory formalities for its exercise. This rule of interpretation is generally recognized and applies to all requirements; the place for the signature, the acknowledgment to witnesses, the signing by witnesses, and the like, are all of equal importance and all must be observed.¹ But a substantial observance of each requirement is sufficient.²

¹ In *re Walker's Estate*, 110 Cal. 1016; *Avaro v. Avaro*, 235 Mo. 424, 387, 52 Am. St. Rep. 154, 30 L. R. A. 138 S. W. 500; In *re O'Neil*, 91 460, 42 Pac. 815; In *re Noyes' Estate*, 40 Mont. 178, 105 Pac. 1013, 153 N. Y. 259, 60 Am. St. Rep. 616,

§ 405. Reasons for Formalities.

One purpose in requiring the attestation of wills is to surround the testator with witnesses who are charged

47 N. E. 272; *Glancy v. Glancy*, 17 Ohio St. 134.

See, post, §§ 439-442, as to power of appointment executed by will.

See, post, §§ 437, 438, as to testator being prevented from signing by act of God.—*Haynes v. Haynes*, 33 Ohio St. 598, 615, 31 Am. Rep. 579; *Sears v. Sears*, 77 Ohio St. 104, 11 Ann. Cas. 1008, 82 N. E. 1067; *Luper v. Werts*, 19 Ore. 122, 23 Pac. 850; *Richardson v. Orth*, 40 Ore. 252, 66 Pac. 925, 69 Pac. 455; *Hays v. Harden*, 6 Pa. St. 409.

"Since the right to make a testamentary disposition is dependent upon the will of the legislature, it is no hardship upon any one that the mode and formalities by which it may be effectively done are made mandatory by the same power. This rule of interpretation is recognized and applied by the courts generally, both in England and in this country, whether the particular formality involved refers to the place of the signature of the testator, the fact that he signed or made acknowledgment in the 'presence of the witnesses,' or that he made publication, or that the witnesses have properly signed in his presence, and in the presence of each other and at his request. All of these formalities stand as of equal importance, and all must be ob-

served."—*In re Noyes' Estate*, 40 Mont. 178, 105 Pac. 1013, citing *Dallow's Case*, L. R. 1 P. & D. 189; *Ludlow v. Ludlow*, 36 N. J. Eq. 597; *Matter of Whitney*, 153 N. Y. 259, 60 Am. St. Rep. 616, 47 N. E. 272; *Glancy v. Glancy*, 17 Ohio St. 134; *Haynes v. Haynes*, 33 Ohio St. 598, 615, 31 Am. Rep. 579; *Richardson v. Orth*, 40 Ore. 252, 66 Pac. 925, 69 Pac. 455; *Luper v. Werts*, 19 Ore. 122, 23 Pac. 850; *Hays v. Harden*, 6 Pa. St. 409.

The general rule is that a will without a date is valid, unless the statute requires a date.—*Peace v. Edwards*, 170 N. C. 64, 86 S. E. 807.

"All the cases show," says Lord Brougham, "that the signing in pencil affords a prima facie presumption that the act is only deliberative; yet it may be shown to be otherwise."—*Bateman v. Pennington*, 3 Moore P. C. C. 223, 227. But, see, ante, § 36, as to materials to be used in making and executing wills.

See, ante, § 35, no technical form is essential.

As to inserting the date in the will, see § 40.

See, ante, § 37, experts may decipher illegible writing or interpret foreign wills.

2 Montgomery v. Perkins, 2 Metc. (Ky.) 448, 74 Am. Dec. 419; *In re Kohn's Estate*, 172 Mich. 342,

with the present duty of noting his condition and mental capacity; another is to insure the identity of the instrument and to prevent the fraudulent substitution of another document at the time of its execution.³ When a will is offered for probate, the question which first concerns the court is whether or not the requirements of the law as to the execution of wills have been complied with.⁴ The fact that if the will fails the beneficiaries named therein will lose is not entitled to any weight.⁵

§ 406. All Requirements Must Be Observed: Intention, Alone, Is Insufficient.

A testator must do everything the law prescribes for the execution of wills, and must so intend. It is said there is a valid execution of a will where the person undertaking to make it performs certain acts with the intention of thereby executing his will, leaving nothing undone which he undertook in order to carry out that intention, and the acts so performed include everything necessary under the statute.⁶ The intention alone is not sufficient. Even though a person undertakes to make his will and to do certain acts with the intention of executing the same, omitting to do nothing he intended to do, yet if he fails to satisfy the statutory requirements as to execution, the document must be denied probate. And if he omits to perform some prescribed act, although the omis-

137 N. W. 735; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158; *Torry v. Bowen*, 15 Barb. (N. Y.) 304; *McDonough v. Loughlin*, 20 Barb. (N. Y.) 238; *Peck v. Cary*, 38 Barb. (N. Y.) 77.

³ *In re Pope*, 139 N. C. 484, 111 Am. St. Rep. 813, 4 Ann. Cas. 635,

7 L. R. A. (N. S.) 1193, 52 S. E. 235.

⁴ *In re Noyes' Estate*, 40 Mont. 178, 105 Pac. 1013.

⁵ *Brengle v. Tucker*, 114 Md. 597, 80 Atl. 224.

⁶ *In re Dombrowski's Estate*, 163 Cal. 427, 125 Pac. 233.

sion may be accidental and contrary to his intentions, nevertheless the instrument can not stand as a valid will. Although there may be no doubt of his testamentary capacity and intentions, his freedom from influence, the absence of fraud, and the justice of the provisions attempted to be made, yet the failure to comply with all the formalities demanded by the statute can not be overlooked.⁷

§ 407. The Same Subject: Parol or Extrinsic Evidence, When Admissible.

Parol or extrinsic evidence is inadmissible to show that a decedent intended to execute his will according to all the formalities prescribed by statute. Such evidence can not be allowed for the purpose of showing that he intended to sign "at the end" of the will when an inspection of the document shows that his signature was placed elsewhere. Intention to make a will is, of course, required, and lack of testamentary intent may be shown even though the instrument was duly executed. But evidence will not be received for the purpose of proving that a decedent intended to comply with all statutory requirements for the execution of wills if the instrument, on its face, establishes the fact to the contrary.⁸

⁷ *In re Tyrrell's Estate*, 17 Ariz. 418, 153 Pac. 768.

Any instrument of testamentary character, in order to be entitled to probate as a will, must be attested in the manner required by law.—*In re Plumel's Estate*, 151 Cal. 77, 121 Am. St. Rep. 100, 90 Pac. 192; *Gump v. Gowans*, 226 Ill. 635, 117 Am. St. Rep. 275, 80

N. E. 1086; *Schofield v. Thomas*, 236 Ill. 417, 86 N. E. 122.

⁸ *Matter of Seaman*, 146 Cal. 455, 106 Am. St. Rep. 53, 2 Ann. Cas. 726, 80 Pac. 700; *Patterson v. Ransom*, 55 Ind. 402; *Matter of Hewitt*, 91 N. Y. 261; *Warwick v. Warwick*, 86 Va. 596, 6 L. R. A. 775, 10 S. E. 843.

§ 408. Wills Must Be Executed With Testamentary Intent.

A document may be offered for probate in the form of a will, apparently duly executed with all the formalities required by statute. Such a document, however, should be rejected for probate unless it was executed by the testator with *animus testandi*. He must not only have known the contents of the instrument, but must have intended it as his will, otherwise it should not be admitted. If it was executed merely in jest and such a state of facts can be shown, the instrument is not a last will; but if the statutory requirements have been observed and the instrument is sought to be defeated because the maker executed the same for the purposes of a joke, such evidence must be clearly shown in order to warrant rejection of the instrument.⁹

§ 409. Knowledge of the Contents of the Will.

It must appear that the testator knew the contents of the will when he signed the instrument.¹⁰ In ordinary cases, where the testator is shown to have had testamentary capacity and there are no circumstances of suspicion surrounding the case, it is not necessary to establish by proof that he had knowledge of the contents of the will. Such formal knowledge will be presumed where formal proof of execution and testamentary capac-

⁹ *Nichols v. Nichols*, 2 Phillim. 180; *Lister v. Smith*, 3 Sw. & Tr. 282.

See, ante, § 52, evidence of surrounding circumstances limited to purpose of ascertaining intent.

See, ante, § 54, extrinsic evidence as affecting the question of intent.

See, ante, §§ 102-115, as to intention in connection with conditional or contingent wills.

¹⁰ *Richardson v. Richards*, (Mass.) 115 N. E. 307. See, post, § 431.

See, ante, § 38, language of wills may be suggested by others.

ity are shown, and no facts to the contrary appear;¹¹ but where a person is so illiterate that he can not read or write and must subscribe his signature by mark, and where the person who prepared the will is the principal beneficiary under it, the presumption of knowledge is overcome.¹² The rule is, however, that wills executed by persons believing them valid are not to be lightly set aside where there is no question of mental incompetency or undue influence;¹³ and such an instrument, written in the English language, has been held good when the testator was unfamiliar with that language and did not understand the technical words used.¹⁴ But in such case it must have the essentials of a will known to the statute and not be in the shape of some other legal paper.¹⁵

§ 410. Execution Under the Statute of Wills of Henry VIII.

In England, prior to the Statute of Wills of 32 Henry VIII, ch. 1, wills were not required to be in writing. By that act, and the statute of 34 and 35 Henry VIII, ch. 5, which explained the former, all devises of real property were required to be in writing; bequests of personalty,

¹¹ *Bartee v. Thompson*, 8 Baxt. (Tenn.) 513; *Cox v. Cox*, 4 Sneed (Tenn.) 81, 87; *Patton v. Allison*, 7 Humph. (Tenn.) 320, 332.

¹² *Maxwell v. Hill*, 89 Tenn. 584, 15 S. W. 253.

¹³ *In re Grant's Will*, 149 Wis. 330, 135 N. W. 833. See, post, § 431.

¹⁴ *Sansona v. Lاراia*, 88 Conn. 136, 90 Atl. 28. And see, *In re Silva's Estate*, 169 Cal. 116, 145 Pac. 1015.

¹⁵ See *Armendariz de Acosta v. Cadena*, (Tex. Civ. App.) 165 S. W. 555, where the paper produced as

a will was in the form of a notarial certificate and had not been signed by the decedent.

See, ante, § 44 and following, as to instruments in the form of deeds, notes, letters, etc., being admitted to probate.

See, ante, § 45, as to features which distinguish wills from other instruments.

See, ante, § 49. An instrument may be construed as a will although not so intended by its maker.

however, could be made orally as before.¹⁶ Both the above laws, however, related more to the property which could be devised, rather than the forms and ceremonies which were required to be observed in order to give validity to such dispositions. Under the Statute of Frauds oral wills of personal property were still allowed, but so many restrictions were imposed that they were in effect practically abolished.¹⁷

§ 411. Execution Under the Statute of Frauds.

Section 5 of the Statute of Frauds, 29 Charles II, ch. 3, required that all devises and bequests of any lands or tenements should be in writing, signed by the party so devising the same, or by some other person in his presence and by his express direction, and that they should be attested and subscribed in the presence of the devisor by three or four credible witnesses, or else they should be utterly void and of no effect. The Statute of Wills of 1 Victoria, ch. 26,¹⁸ provides that no will, whether of real or personal property, shall be valid unless it be in writing, signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the

¹⁶ See, ante, § 15.

¹⁷ Statute of 29 Charles II, ch. 3, §§ 19, 20, 21, 22 (A. D. 1677).

See, ante, §§ 17, 18.

As to the Statute of Frauds and nuncupative wills, see, ante, §§ 165-170.

¹⁸ Statute of 1 Victoria, ch. 26, § 9 (A. D. 1837). The provisions of section 9 of this statute regarding signing by the testator by "some other person in his presence and by his direction," were copied from the Statute of Frauds.

testator, but no other form of attestation shall be necessary.

In the United States the rules regarding the execution of wills were adopted from the Statute of Frauds, its provisions in this regard having been substantially re-enacted in many of the states, with some subsequent additions or alterations. The Statute of Wills of 1 Victoria, ch. 26, has likewise had influence as being an example for amendments to prior laws.

§ 412. Signing by the Testator: Rule Under the Statute of Frauds.

The signature of the testator was not essential to the validity of a will at common law, nor was it demanded by the statutes enacted under Henry VIII, the requirement first appearing in the Statute of Frauds.¹⁹ That act required that a devise of lands and tenements had to be "signed by the party so devising the same, or by some other person in his presence, and by his express direction." The position of the signature was not stated. This question arose about four years after the passage of the last named act, in *Lemayne v. Stanley*, wherein it was held that in the will in question the place of the signature was immaterial, whether "the top, bottom or margin" of the instrument, since it had been written by the testator's own hand, and its opening words, as

¹⁹ Under the Statute of Frauds it had been held that sealing a will was a signing. See *Warneford v. Warneford*, 2 Str. 764; *Right v. Price*, 1 Dougl. 244.

But see *contra*: *Ellis v. Smith*, 1 Ves. Jun. 11; *Wright v. Wakeford*, 17 Ves. Jun. 459.

Sealing, without signing, in the presence of witnesses makes a valid will, this being in the nature of an acknowledgment, the will having been previously signed.—*Gryle v. Gryle*, 2 Atk. 176.

so written, were: "In the name of God, I, John Stanley, make this my last will and testament."²⁰ This has since been the prevailing rule, it being necessary, however, that it do not appear that the testator intended, when so writing his name, to again make his signature; but an acknowledgment of such a signing as his signature, before witnesses, would overcome such objection.²¹

§ 413. Position of the Testator's Signature: English Rule.

Under the Statute of 1 Victoria, ch. 26, § 9, as first enacted, requiring the will to be "signed at the foot or end thereof," it was decided that the testator's name should be written immediately under the portion of the will which disposed of property so that there should be room for nothing between.²² Because of such ruling the position of the testator's signature was regulated by the Statute of 15 and 16 Victoria, ch. 24, § 1, it being required by that act to be placed "at or after, or following, or under, or beside, or opposite to the end of the will." Thus, although formerly a blank space between the disposing part of the will and the testator's signature invalidated the instrument, the law now is that neither a hiatus be-

²⁰ Lemayne v. Stanley, 3 Levinz 1, s. c. Freem. 538, 1 Eq. Cas., Abr. 403.

This rule was questioned by Lord Eldon in Coles v. Trecothick, 9 Ves. Jun. 234, where he said in effect he could see no reason why a will in this form should be effective to transmit lands any more than an unsubscribed deed, written by the grantor in the first person.

²¹ Hilton v. King, 3 Levinz 86;

Cook v. Parsons, Prec. Ch. 184; Grayson v. Atkinson, 2 Ves. Sen. 454; Morrison v. Turnour, 18 Ves. Jun. 175.

See, also, Griffin v. Griffin, 4 Ves. Jun. 197, n.; Walker v. Walker, 1 Mer. 503.

²² 1 Jarm. Wills, 5th Am. Ed. *105.

See Margary v. Robinson, L. R. 12 P. & D. 8, as to a will invalidated for having been signed otherwise than at the end.

tween the disposing portions,²³ nor between those and the subscription,²⁴ will affect its validity. It is sufficient if the testator's signature be so appended to the paper that none of the disposing part of the will shall follow it, and it be apparent on the face of the instrument that the testator intended by affixing his signature to give effect to it as his will.²⁵ It is therefore immaterial whether he sign at,²⁶ or after, or following, or under, or beside, or opposite the end of the will.²⁷

§ 414. No Disposing Clauses Should Follow Signature.

A will is not invalidated because the testator's signature be in the *testimonium* clause;²⁸ or if it be after the attestation clause,²⁹ either below or beside the names of the witnesses;³⁰ or, if the will be wholly in the testator's handwriting, it be in the attestation

²³ In re Collins, 5 Redf. (N. Y.) 20.

²⁴ Page v. Donovan, 3 Jur. N. S. 220; Hunt v. Hunt, L. R. 1 P. & D. 209; Estate of Blake, 136 Cal. 306, 89 Am. St. Rep. 135, 68 Pac. 827.

A proviso to the rule is that the signature must not precede a disposing paragraph or clause.—Baker v. Baker, 51 Ohio St. 217, 37 N. E. 125; cited in Re Gibson's Will, 128 App. Div. 769, 113 N. Y. Supp. 266.

²⁵ In re Hammond, 3 Sw. & Tr. 90; s. c., 32 Law J. Prob. 200; Trott v. Trott, 29 Law J. Prob. 156; s. c., 6 Jur. N. S. 760; Sweetland v. Sweetland, 4 Sw. & Tr. 6, 9; s. c., 34 Law J. Prob. 42; In re Bullock, 3 Curt. 750; Dunn v. Dunn, L. R. 1 P. & D. 277.

²⁶ In re Woodley, 3 Sw. & Tr. 429, 33 Law J. Prob. 154.

²⁷ In re Williams, L. R. 1 P. & D. 4, and cases cited; In re Ainsworth, L. R. 2 P. & D. 151.

²⁸ In re Mann, 28 L. J. Prob. 19.

²⁹ Hallowell v. Hallowell, 88 Ind. 251; Younger v. Duffie, 94 N. Y. 535, 46 Am. Rep. 156; In re Laudy's Will, 161 N. Y. 432, 55 N. E. 914; In re Busch's Will, 87 Misc. Rep. 239, 150 N. Y. Supp. 419; In re Randolph's Estate, 97 Misc. Rep. 548, 163 N. Y. Supp. 411.

³⁰ In re Jones, 4 Sw. & Tr. 1, 34 Law J. Prob. 41; In re Puddephatt, L. R. 2 P. & D. 97; In re Horsford, L. R. 3 P. & D. 211; Cohen's Will, 1 Tuck. (N. Y.) 286.

clause.³¹ The fact that the testator signed his name on a side of the paper where no disposing part of the will is written above it, does not render it invalid³² although there was sufficient space on the preceding page to have subscribed it there.³³ But the last mentioned rule would not apply if it be shown that the signature was not so placed for the purpose of giving effect to the instrument as a will.³⁴ If, however, the paper is so folded that nothing but the testator's name is visible at the time of attestation, it must be proved that the will was written before he signed it.³⁵ And if the names of the testator and the witnesses be written on a separate sheet of paper attached at the end of the will,³⁶ it must be clearly proved to have been attached thereto before the execution of the instrument, or probate will be denied.³⁷

§ 415. American Rule as to Signature of Testator Based Generally on the Statute of Frauds.

In the United States the rules regarding the execution of wills were adopted from the Statute of Frauds, its

31 In re Walker, 2 Sw. & Tr. 354, s. c. 31 Law J. Prob. 62; In re Huckvale, L. R. 1 P. & D. 375; In re Casmore, L. R. 1 P. & D. 653; In re Pearn, L. R. 1 Pro. Div. 70; In re Rudolph's Estate, 97 Misc. Rep. 548, 163 N. Y. Supp. 411.

Contra: When it does not expressly appear from the will that the testator wrote it.—*Sisters of Charity v. Kelly*, 67 N. Y. 409.

32 In re Williams, L. R. 1 P. & D. 4; In re Horsford, L. R. 3 P. & D. 211.

33 In re Archer, L. R. 2 P. & D. 252; s. c., 40 L. J. Prob. 80; Hunt v.

Hunt, L. R. 1 P. & D. 209; In re Rice, 5 Ir. Eq. 176.

34 In re Wilson, L. R. 1 P. & D. 269.

35 In re Hammond, 3 Sw. & Tr. 90, s. c. 32 Law J. Prob. 200.

Contra: *Beckett v. Howe*, L. R. 2 P. & D. 1.

36 *Cook v. Lambert*, 3 Sw. & Tr. 46, 32 Law J. Prob. 93; In re Horsford, L. R. 3 P. & D. 211.

37 In re Lambert, 8 Jur. N. S. 158, 31 L. J. Prob. 118; In re West, 32 Law J. Prob. 182, s. c. 9 Jur. N. S. 1158; In re Hammond, 3 Sw. & Tr. 90, 32 L. J. Prob. 200.

provisions in this respect having been substantially re-enacted in the various states, with occasional additions and alterations. In nearly all the original thirteen, the re-enactment was more than merely substantial. Chancellor Kilty, in his report to the legislature of Maryland on the English Statutes introduced into the body of the law of that state, said: "The fifth and sixth sections, respecting the manner of signing wills, are copied nearly word for word in the testamentary law." That report was made in 1811, and it will be found on inspection that the Maryland act referred to has remained unaltered ever since.³⁸ Generally, in the original states, the re-enactment was a faithful copy, and Maryland is not the only one of them so conservative as to retain the old words even now, unheeding the suggestion of the Statutes of Victoria.³⁹ New York and Pennsylvania re-enacted the Statute of Frauds, but afterwards altered the provision in respect to the place of the signature,⁴⁰ in so doing, anticipating the Statutes of Victoria.

³⁸ Maryland Code (1911), § 323.

³⁹ Revised Codes of Delaware (1915), § 3241; Park's Ann. Civ. Code of Georgia (1914), § 3846; Revised Laws of Massachusetts (1902), ch. 135, § 1; Public Statutes of New Hampshire (1901), ch. 186, § 2; Compiled Statutes of New Jersey (1911), p. 5867, § 24; Pell's Revision, North Carolina (1908), § 3113; *Devereux v. McMahon*, 108 N. C. 134, 141, 12 L. R. A. 205, 12 S. E. 902; Civil Code of South Carolina (1912), § 3564.

⁴⁰ "That part of the Statute of Frauds which related to devises was re-enacted in this state and

furnished the rule as to the execution of wills until the enactment of the Revised Statutes in 1830."—*Hoysradt v. Kingman*, 22 N. Y. 372; N. Y. Decedent Estate Law (Consol. Laws 1909, ch. 13), § 21; Laws of Pennsylvania, 1833, ch. 128, § 6; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567; *Butler's Estate*, 223 Pa. St. 252, 72 Atl. 508.

"In Virginia an enactment similar to 29 Charles II, ch. 3, §§ 19-21, existed for many years, until 1835, when the case of *Worsham's Admr. v. Worsham's Exr.*, 5 Leigh (Va.) 589, occasioned so much uneasiness, by presenting

§ 416. Statutory Regulations as to Signing.

A majority of the states of the Union merely require that a will be "signed by the testator, or by some other person in his presence and by his express direction," the place where the signature is to be written not being specified. In Virginia and West Virginia, while "signing" only is required, yet it must be "in such manner as to make it manifest that the same is intended as a signature."⁴¹ Other jurisdictions, notably New York and Pennsylvania, and the newer Western states, viz., Arkansas, California, Idaho, Kansas, Montana, North Dakota, Ohio, Oklahoma, South Dakota and Utah, require that the will be signed or subscribed "at the end thereof." In this respect the lead was taken by California.⁴²

sharply the danger of fraud in such a state of the law, as led to the act of 1834-5, perfected at the revisal of 1849 into its present form."—2 Minor's Institutes, 1020; Public Statute Laws of Connecticut (1821), tit. 32, ch. 1.

"By the act relating to wills of March 23, 1840, a change was made in the law in regard to the execution of domestic and foreign wills. Under this act wills were to be 'signed at the end thereof,' which was not required in the prior acts of 1824 and 1831."—Jones v. Robinson, 17 Ohio St. 171.

⁴¹ A valid will may be written on separate papers, and the name of the testator need not be subscribed, it being a sufficient signing if the name appears in any part of the will.—Alexander v. Johnston (N. C.), 88 S. E. 785.

See, also, In re Swaim's Will, 162 N. C. 213, Ann. Cas. 1915A, 1207, 78 S. E. 72; Boger v. Cedar Cove Lumber Co., 165 N. C. 557, 559, 81 S. E. 784.

⁴² See synopsis of statutes of the various states, Appendix, this volume.

Minnesota, which became a state in 1858, at first, following Pennsylvania, enacted that a will must be "signed at the end," which remained in force until after the decision in Waite v. Frisbie, 45 Minn. 361, 47 N. W. 1069. The rule now is the same as the majority, signing only being required.

See, also, General Stats. Minnesota (1913), § 7250; Geraghty v. Kilroy, 103 Minn. 286, 114 N. W. 838.

§ 417. The Same Subject: American Rule Under Acts Similar to the Statute of Frauds.

Under the Statute of Frauds, as we have seen, the testator's signature might be placed in any part of the will.⁴³ Wherever the statutes which have been copied from it have only required the testator's name to be signed, without adding "at the end thereof," or some equivalent expression, the same rule has prevailed,⁴⁴ provided that the

⁴³ Ante, § 412.

⁴⁴ *Armstrong v. Armstrong*, 29 Ala. 538; *In re Miles' Will*, 4 Dana (Ky.) 1; *Allen v. Everett*, 12 B. Mon. (Ky.) 371; *Armstrong v. Walton*, 105 Miss. 337, Ann. Cas. 1916E, 137, 46 L. R. A. (N. S.) 552, 62 So. 173; *In re Phelan's Estate*, 82 N. J. Eq. 316, 87 Atl. 625; *In re Bullivant's Will*, 82 N. J. L. 340, Ann. Cas. 1915C, 72, 51 L. R. A. (N. S.) 169, 88 Atl. 1093; *Gilman v. Gilman*, 1 Redf. (N. Y.) 354; *Glancy v. Glancy*, 17 Ohio St. 134; *Adams v. Field*, 21 Vt. 256; *Waller v. Waller*, 1 Grat. (Va.) 454, 42 Am. Dec. 564; *Murguiondo v. Nowland's Exr.*, 115 Va. 160, 78 S. E. 600.

Compare: *In re Booth's Will*, 3 Demarest (N. Y.) 416; *Ramsey v. Ramsey's Exr.*, 13 Grat. (Va.) 664, 70 Am. Dec. 438.

Where a statute of wills merely provides that the will shall be signed, it is sufficient if the name of the testator appears in his handwriting in the body of the will. — *Hall v. Misenheimer*, 137 N. C. 183, 185, 107 Am. St. Rep. 474, 49 S. E. 104; *Burriess v. Starr*,

165 N. C. 657, 660, Ann. Cas. 1914D, 71, 81 S. E. 929; *Peace v. Edwards*, 170 N. C. 64, 86 S. E. 807.

Where the statute does not require a will to be signed at the end, the signature in the margin of the last page is sufficient. — *Murguiondo v. Nowland's Executor*, 115 Va. 160, 78 S. E. 600.

A will is valid notwithstanding it is signed after instead of before the attestation clause. — *In re Young's Will*, 153 Wis. 337, 141 N. W. 226.

In *Graham v. Edwards*, 162 Ky. 771, 173 S. W. 127, the court said: "We have been able to find but one case where a will was signed identically as the one here under consideration. In *Goods of Collins*, 3 L. R. Ir. 241, the testator placed his signature transversely along the left-hand margin of the sheet of paper on which the will was written, there not being room at the bottom of the sheet for his signature. The will was held valid as a substantial compliance with the act of 15 Victoria, ch. 24, a statute somewhat similar to our own."

signature appear to have been made for the purpose of giving effect to the will, and that no further signing was contemplated.⁴⁵ The intention of signing might be shown either from the instrument itself, as where it concluded with a *testimonium* clause,⁴⁶ and it has been said that it might be established even by extrinsic evidence.⁴⁷ But no such intention can be inferred in a case where the signer of the instrument did not know its contents.⁴⁸

§ 418. Necessary to Sign but Once, Although Will May Consist of Several Sheets.

In Massachusetts a will proper was written on five consecutive sheets of paper, on the margin of each of which the testator then wrote his name in the presence of the witnesses, they signing under the attestation clause,

In *Meads v. Earle*, 205 Mass. 553, 29 L. R. A. (N. S.) 63, 91 N. E. 916, a printed form of will beginning "I," with the name of the testatrix, was filled out in her hand, but was not otherwise signed by her. She took the instrument to three witnesses, stating to each in turn that the paper was her last will and testament, and each witness signed without seeing the others sign and without seeing any signature of the testatrix. The will was held properly signed and attested. Citing *Lemayne v. Stanley*, 3 Levinz 1; *Dewey v. Dewey*, 1 Metc. (42 Mass.) 349, 35 Am. Dec. 367; *Adams v. Field*, 21 Vt. 256.

See *Meads v. Earle*, supra, as to adoption of name in exordium as the signature of the testator.

⁴⁵ *Meads v. Earle*, 205 Mass. 553,

29 L. R. A. (N. S.) 63, 91 N. E. 916; *Catlett v. Catlett*, 55 Mo. 330; *In re Phelan's Estate*, 82 N. J. Eq. 316, 87 Atl. 625; *In re Brennan's Estate*, 244 Pa. St. 574, 91 Atl. 220; *Waller v. Waller*, 1 Grat. (Va.) 454, 42 Am. Dec. 564.

Compare: *Griffin v. Griffin*, 2 Ves. 197, n.; *Coles v. Trecothick*, 9 Ves. Jr. 249; *Right v. Price*, 1 Doug. 241; *Walker v. Walker*, 1 Mer. 503; *Sweetland v. Sweetland*, 4 Sw. & Tr. 6, 9; s. c., 34 Law J. Prob. 42.

⁴⁶ *Catlett v. Catlett*, 55 Mo. 330.

⁴⁷ *Right v. Price*, 1 Doug. 241; *Waller v. Waller*, 1 Grat. (Va.) 454, 42 Am. Dec. 564; *Ramsey v. Ramsey's Exr.*, 13 Grat. (Va.) 664, 70 Am. Dec. 438.

⁴⁸ *Richardson v. Richards*, (Mass.) 115 N. E. 307.

which was on a sixth sheet. The testator, immediately afterward, doubting the validity of the execution, recalled the witnesses and in their presence wrote his name between the *testimonium* and the attestation clauses, but the witnesses did not re-sign in attestation. The instrument was held good, the writing on the margin of the fifth sheet constituting the testator's signature. The names placed on the margins of the four other sheets and over the attestation clause were disregarded.⁴⁹ The court said the testator might, for purposes of identification, mark each of the sheets, but could sign the will only once. As for the writing of his name over the attestation clause, that was, in the circumstances, of no effect as a signature, the reason being that the witnesses had already signed this clause, whereas the law requires that the will must be signed by the testator before it can be attested by witnesses.⁵⁰ It may be said in connection with the latter point that a court has gone so far as to hold that the testator must sign before even requesting the witnesses to sign in attestation.⁵¹

§ 419. Signing or Subscribing at the End: Reason for Rule.

It is not necessary for the testator's signature to be placed at the end of his will unless the statute requires

⁴⁹ Thomson v. Carruth, 218 Mass. 524, 106 N. E. 159; s. c., 220 Mass. 77, 107 N. E. 395.

As to the presumption where a will consists of several sheets, see § 64.

⁵⁰ Reed v. Watson, 27 Ind. 443, 448; Chase v. Kittredge, 11 Allen (93 Mass.) 49, 87 Am. Dec. 687;

Thomson v. Carruth, 218 Mass. 524, 106 N. E. 159; Barnes v. Chase, 208 Mass. 490, 94 N. E. 694; Table Rock Lumber Co. v. Branch, 158 N. C. 251, 73 S. E. 164. But see In re Silva's Estate, 169 Cal. 116, 145 Pac. 1015.

⁵¹ In re Kunkler's Will, 147 N. Y. Supp. 1094.

it to be "subscribed";⁵² but where so prescribed, the will is invalid unless so signed.⁵³

The statutory provision that a will must be "signed or subscribed at the end thereof," was adopted to remedy real or threatened evils; therefore, its force should not be "frittered away by exceptions." Its provisions should not be carried beyond the policy of the framers of it, yet that policy should not be defeated by judicial construction,⁵⁴ or by lax interpretation.⁵⁵ A very evident purpose of requiring the signature at the end of the will is not only that it may appear on the face of the instrument that the testamentary purpose which is expressed therein is completed and that the mind of the testator is fully made up to dispose of his property in the manner expressed, but also to prevent any opportunity for fraudulent or other interlineations.⁵⁶

⁵² *Devereux v. McMahon*, 108 N. C. 134, 12 L. R. A. 205, 12 S. E. 902; *Richards v. W. M. Ritter Lumber Co.*, 158 N. C. 54, 56, *Ann. Cas.* 1913D, 313, 73 S. E. 485; *Peace v. Edwards*, 170 N. C. 64, 86 S. E. 807.

⁵³ *In re Diehl's Will*, 112 N. Y. Supp. 717; *In re Schlegel's Will*, 62 Misc. Rep. 439, 116 N. Y. Supp. 1038; *In re Field's Will*, 144 App. Div. 737, 129 N. Y. Supp. 590.

⁵⁴ *Matter of Seaman's Estate*, 146 Cal. 455, 106 Am. St. Rep. 53, 2 *Ann. Cas.* 726, 80 Pac. 700; *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Will of Hewitt*, 91 N. Y. 261; *Matter of Whitney*, 153 N. Y. 259, 60 Am. St. Rep. 616, 47 N. E. 272; *Hays v. Harden*, 6 Pa. St. 409.

⁵⁵ *Matter of Seaman's Estate*, 146 Cal. 455, 106 Am. St. Rep. 53,

2 *Ann. Cas.* 726, 80 Pac. 700; *Glancy v. Glancy*, 17 Ohio St. 134; *Will of O'Neil*, 91 N. Y. 516; *Yonger v. Duffie*, 94 N. Y. 535, 46 Am. Rep. 156; *Matter of Andrews' Will*, 162 N. Y. 1, 76 Am. St. Rep. 294, 48 L. R. A. 662, 56 N. E. 529.

"The statutes requiring the testator to subscribe 'at the end' of the will are obviously intended to prevent fraud in the way of unauthorized additions, and so are to be 'strictly construed.'" — *In re Gibson's Will*, 128 App. Div. 769, 113 N. Y. Supp. 266.

But compare: *In re De Hart's Will*, 67 Misc. Rep. 13, 122 N. Y. Supp. 220.

⁵⁶ *Matter of Seaman's Estate*, 146 Cal. 455, 106 Am. St. Rep. 53, 2 *Ann. Cas.* 726, 80 Pac. 700;

§ 420. The Same Subject: Requirement Must Be Complied With Although No Fraud Be Shown.

It is immaterial that no charge of fraud has been interposed. Where the legislature evidently intended to guard against fraud and uncertainty and prescribed the formalities required for the prevention of such fraud, a failure to comply with such requirements is not excused by the showing that no fraud existed. If opportunity for alteration or interlineation is permitted the fraud may be so skillfully accomplished as to preclude discovery. While there may be the same opportunity for fraudulent interpolation in a will if the testator should leave sufficient space therefor between several items of his will, yet the

Soward v. Soward, 1 Duv. (62 Ky.) 126; *McGuire v. Kerr*, 2 Bradf. (N. Y.) 244; *Matter of O'Neil's Will*, 91 N. Y. 516; *Matter of Andrews' Will*, 43 App. Div. 394, 60 N. Y. Supp. 141, affirmed 162 N. Y. 1, 76 Am. St. Rep. 294, 48 L. R. A. 662, 56 N. E. 529; *Matter of Hewitt's Will*, 91 N. Y. 261; *Younger v. Duffie*, 94 N. Y. 535, 46 Am. Rep. 156; *Matter of Conway*, 124 N. Y. 455, 11 L. R. A. 796, 26 N. E. 1028; *Glancy v. Glancy*, 17 Ohio St. 134; *In re Wineland's Appeal*, 118 Pa. St. 37, 4 Am. St. Rep. 571, 12 Atl. 301; *In re Brennan's Estate*, 244 Pa. St. 574, 91 Atl. 220; *Ramsey v. Ramsey's Exr.*, 13 Grat. (Va.) 664, 70 Am. Dec. 438; *Warwick v. Warwick*, 86 Va. 596, 6 L. R. A. 775, 10 S. E. 843.

No subscription or signing of any kind will constitute a valid execution of a will, unless made

with the intention on the part of the testator of finally and completely authenticating the will.—*In re Dombrowski's Estate*, 163 Cal. 290, 125 Pac. 233.

In the case of *Sears v. Sears*, 77 Ohio St. 104, 11 Ann. Cas. 1008, 1012, 17 L. R. A. (N. S.) 353, 82 N. E. 1067, it was held that the will was not signed by the testatrix at the end thereof. The testimonium clause was set forth at the end of the dispositive portion, followed by a marked line which was blank. The court said: "The obvious purpose for which this blank line was left was for the signature of the testatrix, and it was intended as the end of the will. The absence of her signature there not only discloses that the will is not signed by her at the end thereof, but also implies that she did not sign it at all."

form in which the provisions of the will are drafted is no part of its execution. The legislation does not attempt to prescribe the form in which a testator must express the dispositions which he intends of his property, but it does prescribe the form in which it is to be executed and attested.⁵⁷

§ 421. End of the Will: Effect of Blank Spaces.

The requirement that the testator subscribe his name at the end of the will does not of necessity demand that it shall be in immediate juxtaposition to the concluding words of the dispositive provisions, but that it should be near enough to afford a reasonable inference that the testator thereby intended to indicate that his testamentary dispositions had been fully and completely expressed. The hiatus between disposing portions and the subscription will not affect the validity of the will if the statute is substantially complied with. A slight space such as a single line, or even more, might be left blank between the written matter and the name without rendering the will void, yet to leave blank an entire page or more between the two would indicate a disregard of the requirements of the statute, whether resulting from ignorance or intention, which would prevent its admission to probate.⁵⁸ Even though the disposing portion of the will is on one page, with a blank space at the foot, and the usual attestation clause be at the top of the reverse side, followed by the words, "Witness my hand and

⁵⁷ *Matter of Seaman's Estate*, N. S. (N. Y.) 211; *Matter of* 146 Cal. 455, 106 Am. St Rep. 53, O'Neil's Will, 91 N. Y. 516, 520.
⁵⁸ 2 Ann. Cas. 726, 80 Pac. 700; *Matter of Collins*, 5 Redf. (N. Y.) 20; *Soward v. Soward*, 1 Duv. (62 Ky.) 126.
In re Heady's Will, 15 Abb. Pr.

seal," and the decedent's signature, the will is not thereby invalidated.⁵⁹ Where the will is signed following the *testimonium* clause, it is signed at the end, although there are blanks in the body of the will.⁶⁰ The signature of the testator following the attestation clause is valid,⁶¹ but it is held not "at the end" if it appears in a blank space left in the *testimonium* clause.⁶²

⁵⁹ *Morrow's Estate*, 204 Pa. St. 479, 54 Atl. 313. And see *Mader v. Apple*, 80 Ohio St. 691, 131 Am. St. Rep. 719, 23 L. R. A. (N. S.) 515, 89 N. E. 37.

But see *In re Fults' Will*, 42 App. Div. 593, 59 N. Y. Supp. 756, a case in which there was an addenda of bequests written on sheets of legal cap, which were pinned to a filled out and signed printed form of will.

⁶⁰ Where the will was on a printed form straggling over three pages, with numerous spaces between the written matter, and then a space of about twenty-three inches to the *testimonium* clause, at the end of which was the testator's signature, followed by the attestation clause signed by the witnesses, there being no testamentary provisions after the signature of the testator, the will was held valid.—*Mader v. Apple*, 80 Ohio St. 691, 131 Am. St. Rep. 719, 23 L. R. A. (N. S.) 515, 89 N. E. 37.

⁶¹ *In re Kunkler's Will*, 147 N. Y. Supp. 1094; *In re Busch's Will*, 87

Misc. Rep. 239, 150 N. Y. Supp. 419.

The statutes of California prescribe that the testator must subscribe his will "at the end thereof," and witnesses must "sign at the end of the will." Where the name of the testator was written a short distance below the body of the will, it was held to be "subscribed at the end thereof," and such valid execution was not defeated because the witnesses inserted their signatures above that of the testator.—*In re Dutcher's Estate*, 172 Cal. 488, 157 Pac. 242, 243.

See, also, *Estate of Blake*, 136 Cal. 306, 89 Am. St. Rep. 135, 68 Pac. 827.

Matter below the testator's signature is presumed not to have been in the will at the time of the signing.—*In re Taylor's Estate*, 230 Pa. St. 346, 36 L. R. A. (N. S.) 66, 79 Atl. 632.

⁶² *Sears v. Sears*, 77 Ohio St. 104, 11 Ann. Cas. 1008, 17 L. R. A. (N. S.) 353, 82 N. E. 1067.

§ 422. End of the Will Is the Logical End of the Disposing Portion.

Where the law requires a will to be signed at the end thereof, it means its logical end.⁶³ The name of the testator does not necessarily denote the end of the will, for it can not be said that where the name of the testator is signed, there the will ends. The end of the will must be determined from an inspection of the entire instrument. It is not the foot or physical end of the sheet of paper upon which the will is written, but it is the physical termination of the testamentary provisions.⁶⁴ The end of a will is the logical end; thus, if the testator commenced his will on the first page, then skipped the second page and continued on the third, finally going back to the second page and completing his will thereon, where he signed it, the will was signed at the end.⁶⁵ A will is not invali-

⁶³ *In re Talbot's Will*, 91 Misc. Rep. 382, 154 N. Y. Supp. 1083; *In re Swire's Estate*, 225 Pa. St. 188, 73 Atl. 1110; *In re Stinson's Estate*, 228 Pa. St. 475, 139 Am. St. Rep. 1014, 30 L. R. A. (N. S.) 1173, 77 Atl. 807.

⁶⁴ *Matter of Seaman's Estate*, 146 Cal. 455, 106 Am. St. Rep. 53, 2 Ann. Cas. 726, 80 Pac. 700; *McGuire v. Kerr*, 2 Bradf. (N. Y.) 244; *Matter of Andrews' Will*, 162 N. Y. 1, 76 Am. St. Rep. 294, 48 L. R. A. (N. S.) 662, 56 N. E. 529.

"The end meant by this provision is the logical end of the language used, which shows that the testamentary purpose has been fully expressed."—*Mitchell, C. J.*, in *Swire's Estate*, 225 Pa. St. 188, 73 Atl. 1110; quoted by the court

in *Re Stinson's Estate*, 228 Pa. St. 475, 139 Am. St. Rep. 1014, 30 L. R. A. (N. S.) 1173, 77 Atl. 807, in commenting on the Pennsylvania statute.

⁶⁵ *In re Stinson's Estate*, 228 Pa. St. 475, 139 Am. St. Rep. 1014, 30 L. R. A. (N. S.) 1173, 77 Atl. 807.

Where a will was written and signed by the testator and attested, all on the fourth page of a piece of letter paper, and at the top of the third page there was an unsigned and unattested clause appointing an executor, the will was admitted to probate excluding the matter on the third page.—*In re Teed's Estate*, 225 Pa. St. 633, 133 Am. St. Rep. 896, 74 Atl. 646.

dated because the signature of the testator was written at the end of a third page of a will consisting of four pages, if it be at the end of the will according to such connection and arrangement of the pages as the inherent sense of the instrument requires.⁶⁶ Where there is no evidence of fraud, imposition, or suspicious circumstances, where the language of the will is in grammatical sequence, and where it is apparent that the testator, as a matter of fact, signed his will at the logical or grammatical end thereof, and where there is no inherent evidence that any dispositive clause was written after the will was signed, the physical arrangement of the sheets of paper upon which the will was written does not control and, in the absence of proof to the contrary, the grammatical context will determine the end of the instrument.⁶⁷

In *Re Field's Will*, 144 App. Div. 737, 129 N. Y. Supp. 590, a printed form on the first page of the instrument, providing for the appointment of executors, and the testimonium clause, was filled out in the testator's hand, followed by his signature and those of the witnesses, but the blank spaces in the attestation clause were left unfilled and unsigned. Six sheets of manuscript containing the dispositions made were loosely pinned to this form. The will was denied probate on the authority of *Matter of Fufts' Will*, 42 App. Div. 593, 59 N. Y. Supp. 756, and *Matter of Whitney*, 153 N. Y. 259, 60 Am. St. Rep. 616, 47 N. E. 272.

Where a will is written upon

more than one sheet of paper, it is not necessary that they should be fastened together by mechanical or other device, in order to justify the finding that they constitute one instrument. — *Murrell v. Barnwall*, 110 Ala. 668, 20 So. 1021; *Estate of Merryfield*, 167 Cal. 729, 141 Pac. 259; *Schillinger v. Bawek*, 135 Iowa 131, 112 N. W. 210; *Sellards v. Kirby*, 82 Kan. 291, 136 Am. St. Rep. 110, 20 Ann. Cas. 214, 28 L. R. A. (N. S.) 270, 108 Pac. 73.

⁶⁶ *In re Baker's Appeal*, 107 Pa. St. 381, 52 Am. Rep. 478.

⁶⁷ *In re Peiser's Will*, 79 Misc. Rep. 668, 140 N. Y. Supp. 844, 848; *Matter of Field's Will*, 204 N. Y. 448, Ann. Cas. 1913C, 842, 39 L. R. A. (N. S.) 1060, 97 N. E. 881.

§ 423. Effect of Part of Will Following Signature of Testator.

Although the courts are liberal in regard to the position of the testator's signature, it may be laid down as a general rule that, in those jurisdictions where the signature must be "at the end" of the will, no direction occurring beneath the names of the testator or of the attesting witnesses can have any disposing operation.⁶⁸ Where the witnesses signed at the bottom of one page and at the top of the following, and an important provision of the will followed the signatures, it was ruled not to be a valid attestation.⁶⁹ Nor could such a provision be treated as an interlineation.⁷⁰ A clause following the testator's and witnesses' names which does no more than assign a reason for having made a particular disposition, may vitiate the whole will on the ground that the con-

See, also, *Thomson v. Carruth*, 218 Mass. 524, 106 N. E. 159, where the testator wrote his name in the margin of each of the six sheets composing his will.

An instrument with various provisions, dispositive and otherwise, closely connected, without any intervening blank spaces, and with no testamentary clauses following the signature, the whole body of the instrument in consecutive order showing but one instrument, is sufficiently signed if signed at the end of the whole instrument, and need not be signed at the termination or end of the dispositive clauses. — *Owens v. Douglas*, 121 Ark. 448, 181 S. W. 896, 898; *In re Gilman's Will*, 38 Barb. (N. Y.)

364; *Morrow's Estate, In re*, 204 Pa. St. 479, 54 Atl. 313.

See *In re Rowe's Will*, 159 N. Y. Supp. 615, as to a will being valid although part was written on the back of the first page following the signature, which was at the bottom of the first page.

⁶⁸ *In re Dallow*, L. R. 1 P. & D. 189; *In re Woods*, L. R. 1 P. & D. 556; *McGuire v. Kerr*, 2 Bradf. (N. Y.) 244; *Sisters of Charity v. Kelly*, 67 N. Y. 409; *In re Gibson's Will*, 128 App. Div. 769, 113 N. Y. Supp. 266; *Glancy v. Glancy*, 17 Ohio St. 134; *Baker v. Baker*, 51 Ohio St. 217, 37 N. E. 125; *Hays v. Harden*, 6 Pa. St. 409.

⁶⁹ *Hewitt's Will*, 91 N. Y. 261.

⁷⁰ *O'Neil's Will*, 27 Hun 130; s. c., 91 N. Y. 516.

struction of the bequest might be varied thereby.⁷¹ The same rule has been applied to a clause denying all benefits of the will to a child contesting the instrument.⁷² And it has been held that if matter is written into a will over the signature once made, even if by the testator, the will is not entitled to probate as to such matter, however it might be as to the rest of the contents.⁷³

§ 424. The Same Subject: Illustrations.

A will was written on a printed form of four pages folded in the middle like legal cap and, after the formal beginning, the first, second, and greater part of the third pages were left blank. At the bottom of the third page were the signatures and an attesting clause. Above the signature began a clause of bequest which was continued on the fourth page. It was held that there was no signature "at the end" of the will within the meaning of the statute, and that, as the fourth page could not be rejected and the rest approved, the entire will must be denied probate.⁷⁴ A similar decision is where a will was written, signed, and attested on one side of a page bequeathing certain amounts, "as hereinafter named," with no further explanation. The other side of the page contained twenty lines in the testator's handwriting, making certain dispositions of his property. The witnesses did not see the writing on the second page except as appearing through the paper on the first. It was determined that the reference to matters "hereinafter named" was

⁷¹ Hays v. Harden, 6 Pa. St. 409.

Contra: Stroble v. Smith, 8 Watts (Pa.) 280.

⁷² Irwin v. Jacques, 71 Ohio St. 395, 69 L. R. A. 422, 73 N. E. 683.

⁷³ In re Foley's Will, 76 Misc.

Rep. 168, 136 N. Y. Supp. 933.

⁷⁴ In re O'Neil's Will, 27 Hun 130; s. c., 91 N. Y. 516.

See, also, In re Diehl's Will, 112 N. Y. Supp. 717.

not a sufficient description of an existing paper to incorporate within itself the writing on the opposite side, nor to predicate that the signing was "at the end of the will," and probate even of the first page was denied, as it did not express the full purpose of the testator.⁷⁵

§ 425. The Same Subject: Apparent Exceptions to the Rule.

Apparent exceptions to the general rule that nothing of a disposing nature can be effective if written below the executing signatures are found in cases where, there being no space to complete a sentence at the bottom of a page, it has been continued, with an asterisk of reference, so that it followed the signatures;⁷⁶ also where the first and third pages of a sheet were filled by the will and the signature was written crosswise on the second page;⁷⁷ and again where a lithographed form filled the first page of the sheet and the will was written upon the second and third pages, entirely filling them, and the paper was signed in the printed form on the first page.⁷⁸ In another case it was held not to invalidate

⁷⁵ *Dennett v. Taylor*, 5 Redf. (N. Y.) 561.

See, ante, §§ 65, 66, 67, 68, as to the incorporation in wills of other documents.

In *Re Schlegel's Will*, 62 Misc. Rep. 439, 116 N. Y. Supp. 1038, probate was denied of a printed form of will. The testator signed in the space intended for the mere recital of his name and also at the bottom of the second page, but not in the place intended for his signature, the notary signing there, and the attestation clause

followed his signature. In the body of the form mentioned were the words, "continued on the other side," where directions for the disposition of the estate were written.

⁷⁶ In *re Kimpton*, 3 Sw. & Tr. 427, 33 Law J. Prob. 153.

Compare: In *re Birt*, L. R. 2 P. & D. 214; *Tonnele v. Hall*, 4 N. Y. 140.

⁷⁷ In *re Coombs*, L. R. 1 P. & D. 302.

⁷⁸ In *re Wotton*, L. R. 3 P. & D. 159.

a will that the attestation clause was written on a separate sheet and pasted on at the end, the proof being clear that the will was in other respects duly executed.⁷⁹ But in all these and similar cases clear proof is demanded that the part in question was written prior to the execution of the will,⁸⁰ and even though a clause written subsequently to execution be inserted above the testator's signature, it will not thereby become a part of the instrument.⁸¹

§ 426. The Same Subject: Immaterial Additions.

If the appended clause following the signatures of the testator or witnesses disposes of no property and contains nothing likely to affect the construction of the will,⁸² but is added simply to provide for the appointment of an executor, it does not invalidate the instrument,⁸³ and pro-

⁷⁹ *In re Collins*, 5 Redf. (N. Y.) 20.

⁸⁰ *In re White*, 30 Law J. Prob. 55, 6 Jur. (N. S.) 808.

⁸¹ *In re Arthur*, L. R. 2 P. & D. 273; s. c., 25 L. T. N. 274.

In Re Gartland's Will, 60 Misc. Rep. 31, 112 N. Y. Supp. 718, the will was held not invalidated by reason of a disposing clause placed below the testator's signature, when the same was written by the depository after the signing, outside of the presence of the testator and without the latter's knowledge.

In Re Gibson's Will, 128 App. Div. 769, 113 N. Y. Supp. 266, the court says: "The decisions . . . holding that a material portion of a will following the testator's sub-

scription renders void even that portion of the will prior to such subscription, are based upon the principle that the testator presumably makes his will as a completed whole."

Inasmuch as the act of 1833 requires the signature to a will to be at the end of the instrument, any writing beneath the signature is, in the absence of evidence to the contrary, presumed to have been placed there after the signing.—*In re Taylor's Estate*, 230 Pa. St. 346, 36 L. R. A. (N. S.) 66, 79 Atl. 632.

See, post, §§ 558-561 as to alterations and interlineations.

⁸² *Hays v. Harden*, 6 Pa. St. 409.

⁸³ *Brady v. McCrosson*, 5 Redf. (N. Y.) 431.

bate will be allowed to all except the appointing clause.⁸⁴ Where unimportant and non-dispositive matter follows the testator's signature, it is not a case representing the mischiefs against which the statute sought to guard.⁸⁵

§ 427. Signing by Mark.

When a testator subscribes his will by making his mark, his name is generally written beside it by one of the attesting witnesses, and statutes to that effect have been passed in many jurisdictions. Under the provisions of the Statute of Frauds it was not essential that the testator's name should appear on the face of the will.⁸⁶ The only reason for requiring the testator's name to be written near the mark is to show what name the mark is intended to represent. The name of the testator written in the body of the will and signed by him by his mark was held sufficiently near the mark to satisfy such a requirement.⁸⁷ The sign made by the testator stands as his

⁸⁴ *McCullough's Estate*, Myrick's Prob. (Cal.) 76.

In *New York* three pages of maps following the subscription, and referred to in the will as a part thereof, the property being devised by numbers corresponding to figures on the maps, were admitted to probate together with the will.—*Tonnele v. Hall*, 4 N. Y. 140.

But see *Wineland's Appeal*, 118 Pa. St. 37, 4 Am. St. Rep. 571, 12 Atl. 301.

⁸⁵ In *re Gibson's Will*, 128 App. Div. 769, 113 N. Y. Supp. 266.

⁸⁶ In *re Bryce*, 2 Curt. 325.

See, ante, § 412, as to position of testator's signature.

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⁸⁷ In *re Guilfoyle*, 96 Cal. 598, 22 L. R. A. 370, 31 Pac. 553.

Cal. Civ. Code, § 14, reads in part: "Signature or subscription includes mark, when the person can not write, his name being written near it, by a person who writes his own name as a witness."

Where a testator signs by a mark and his name is written by another at his request, but the person so writing does not sign his name, the signature is, nevertheless, valid under the California statute.—In *re Dombrowski's Estate*, 163 Cal. 290, 125 Pac. 233.

A mark is not a sufficient signature where the person writing

signature; the writing of his name by another can be for the purpose of identification only—it does not take the place of the name of the testator, being signed for him at his express direction.⁸⁸ It is therefore immaterial whether the testator's name be written in before or after he makes his mark.⁸⁹ The addition of the words “his mark,” although made by a stranger, does not affect the validity of the signature.⁹⁰

§ 428. Signing by a Stamp, and Sealing.

A will may be signed by a stamp which the testator was accustomed to use in affixing his name to papers; and this may be validly impressed by another, if done at the testator's request.⁹¹ But sealing is not equivalent to signing,⁹² nor is a seal necessary unless required by statute.⁹³ Even when the attestation clause speaks of a

the grantor's name to a deed fails to sign his own.—*Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1.

It was held in Missouri if the testator execute his will by mark, this must be the only signature of his name.—*St. Louis Hospital Assn. v. Williams' Admr.*, 19 Mo. 609.

An act of legislature making valid the execution of wills signed by marks, is not retroactive in effect to the extent of sustaining the will of one who died before the passage of the act.—*Shinkle v. Crock*, 17 Pa. St. 159; *Davies v. Morris*, 17 Pa. St. 205; *Burford v. Burford*, 29 Pa. St. 221.

⁸⁸ “That a last will and testament can be signed by a mark is universally established. It is im-

material that her name (name of the testatrix) was also signed thereto by another. A signature by mark differs from an authorized signature by another.”—*Points v. Nier*, 91 Wash. 20, 157 Pac. 44, 46.

See, also, *Jackson v. Jackson*, 39 N. Y. 153.

⁸⁹ *Jackson v. Jackson*, 39 N. Y. 153.

⁹⁰ *Grubbs v. McDonald*, 91 Pa. St. 236.

⁹¹ *Jenkyns v. Gaisford*, 3 Sw. & Tr. 93, 32 Law J. Prob. 122.

⁹² *Smith v. Evans*, 1 Wils. (K. B.) 313; *Wright v. Wakeford*, 17 Ves. Jun. 455, 458.

⁹³ *Piatt v. McCullough*, 1 McLean (U. S. C. C.) 69, 70, Fed. Cas. No. 11113; *Doe v. Pattison*, 2

seal, the will is not rendered invalid by reason of there being none.⁹⁴

§ 429. Testator Must Intend the Mark to Stand as His Signature.

It is the general rule that a will is sufficiently signed if the testator make some sign or mark thereon by which his final intent to give effect to the instrument as his will may be made manifest.⁹⁵ But without this intent, as where one was unconscious at the time his mark was

Blackf. (Ind.) 355; *Hight v. Wilson*, 1 Dall. (Pa.) 94, 1 L. Ed. 51; *Avery v. Pixley*, 4 Mass. 460; *Arndt v. Arndt*, 1 Serg. & R. (Pa.) 256; *Williams' Lessee v. Burnet*, *Wright* (Ohio) 53.

⁹⁴ *Ketchum v. Stearns*, 8 Mo. App. 66.

⁹⁵ *Baker v. Dening*, 8 Ad. & E. 94; *Bailey's Heirs v. Bailey*, 35 Ala. 687; *In re Cornelius' Will*, 14 Ark. 675; *Guthrie v. Price*, 23 Ark. 396; *Smith v. Dolby*, 4 Har. (Del.) 350; *Succession of Bradford*, 124 La. 44, 18 Ann. Cas. 766, 49 So. 972; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Robinson v. Jones*, 105 Md. 62, 65 Atl. 814; *Chase v. Kittredge*, 11 Allen (Mass.) 49, 87 Am. Dec. 687; *Geraghty v. Kilroy* (*Tierney's Estate*), 103 Minn. 286, 114 N. W. 838; *St. Louis Hospital Assn. v. Williams' Admr.*, 19 Mo. 609; *St. Louis Hospital Assn. v. Wegman*, 21 Mo. 17; *Van Hanswyck v. Wiese*, 44 Barb. (N. Y.) 494; *In re Engler's Will*, 56 Misc. Rep. 218,

107 N. Y. Supp. 222; *In re Corcoran's Will*, 145 App. Div. 129, 129 N. Y. Supp. 165; *In re Klinzner's Will*, 71 Misc. Rep. 620, 130 N. Y. Supp. 1059; *Long v. Zook*, 13 Pa. St. 400; *In re Flannery's Will*, 24 Pa. St. 502; *Burford v. Burford*, 29 Pa. St. 221; *Vernon v. Kirk*, 30 Pa. St. 218, disapproving *Grabill v. Barr*, 5 Pa. St. 441, 47 Am. Dec. 418; *In re Cozzens' Will*, 61 Pa. St. 196; *In re Hersperger's Estate*, 245 Pa. St. 569, 91 Atl. 942; *Sprague v. Luther*, 8 R. I. 252; *Wilson v. Craig*, 86 Wash. 465, Ann. Cas. 1917B, 871, 150 Pac. 1179; *Points v. Nier*, 91 Wash. 20, 157 Pac. 44, 46.

Compare: *Northcutt v. Northcutt*, 20 Mo. 266; *McCarty v. Hoffman*, 23 Pa. St. 507; *Rosser v. Franklin*, 6 Grat. (Va.) 1, 52 Am. Dec. 97.

A signature by mark is valid if the testator in any way call attention to the mark as his or her intended signature. — *Robinson v. Jones*, 105 Md. 62, 65 Atl. 814.

affixed to the will, there can be no valid signing;⁹⁶ and subsequent declarations and acts of the testator are admissible to show that he did not understand that he had executed the instrument.⁹⁷

§ 430. Signing Initials Only, or Wrong Name.

It does not invalidate a will for the testator to be wrongfully named in the body thereof,⁹⁸ nor does the mistake of writing a wrong name against the mark render the instrument void.⁹⁹ An imperfect or indistinct subscription of the testator's name may be regarded as his mark;¹ also one may make a valid subscription to his will by initials only;² and, if a testator sign by a

⁹⁶ *Boone v. Boone*, 114 Ark. 69, 169 S. W. 779.

⁹⁷ *Canada's Appeal*, 47 Conn. 450.

As to parol declarations, and evidence of surrounding circumstances, see, ante, §§ 52-54.

⁹⁸ *In re Douce*, 2 Sw. & Tr. 593, 31 L. J. Prob. 172, 8 Jur. (N. S.) 73.

⁹⁹ *In re Clarke*, 27 Law J. Prob. 18; s. c., 4 Jur. (N. S.) 243; s. c., 1 Sw. & Tr. 22; *Long v. Zook*, 13 Pa. St. 400.

¹ *Hartwell v. McMaster*, 4 Redf. (N. Y.) 389.

The fact that the testator omits one letter of his first name in signing a will, will not invalidate his signature. — *Boone v. Boone*, 114 Ark. 69, 169 S. W. 779.

A testator named "J. W. Bradford," signing his name "J. W. Bradfor," did not invalidate his will. — *Succession of Bradford*, 124

La. 44, 18 Ann. Cas. 766, 49 So. 972.

The witnesses being positive in their testimony that they signed at the request of the testatrix and in her presence, and that she declared the instrument to be her last will and testament, it was held immaterial that in the attestation clause the name of the testatrix was written "Malinda," whereas her true name, as signed by her, was "Matilda." — *Monroe v. Huddart* (*In re Diener's Estate*), 79 Neb. 569, 14 L. R. A. (N. S.) 259, 113 N. W. 149.

² *In re Savory*, 15 Jur. 1042.

In Re Severance's Will, 96 Miss. Rep. 384, 161 N. Y. Supp. 452, the will was a printed form, filled out in the decedent's handwriting. The subscription, in lieu of a signature, was a piece of printed paper, pasted like a wafer partly over the printed "L. S." on the

wrong name, it will be taken as his mark.³ But where two sisters made mutual wills, and each by mistake signed the will of the other, neither paper was considered to have been duly executed.⁴

§ 431. Presumption Is That Testator Knew Contents of Will Although He Signed by Mark.

Where a will is properly signed and executed, the presumption is that the testator knows its contents, and the rule prevails although the signing be by a mark. Should evidence of fraud or undue influence be produced, affirmative proof of the testator's knowledge of the contents may be necessary, but no such proof is required merely because of the maker's inability to read or write.⁵ The

form, this wafer bearing the inscription, printed in colors, "Merry Christmas; American Red Cross, 1912; Happy New Year," and, in the decedent's handwriting, the word "seal," with his initials above it and repeated below it. The decedent had declared this instrument to be his will in the presence of the witnesses and had requested them to sign in attestation; and, after their compliance, had enclosed it in an envelope and marked on the latter, "Last Will of Charles I. Severance, Dec. 21, 1912." He had then put the sealed envelope in the hands of one of the witnesses for safekeeping.

³ *In re Redding*, 2 Rob. Ecc. 339; s. c., 14 Jur. 1052; *In re Glover*, 11 Jur. 1022.

⁴ *Anon.*, 14 Jur. 402; *In re Hunt*, L. R. 3 P. & D. 250.

Compare: *Hippesley v. Homer*,

Turn. & R. 48, n.; *Trimleston v. D'Alton*, 1 Dow & C. 85; *In re Fairburn*, 4 Notes of Cas. 478.

⁵ *Clifton v. Murray*, 7 Ga. 564, 565, 50 Am. Dec. 411; *Doran v. Mullen*, 78 Ill. 342; *Taylor v. Creswell*, 45 Md. 422; *Nickerson v. Buck*, 12 Cush. (Mass.) 332, 341; *Walton v. Kendrick*, 122 Mo. 504, 25 L. R. A. 701, 27 S. W. 872; *King v. Kinsey*, 74 N. C. 261; *Vernon v. Kirk*, 30 Pa. St. 218, 224.

See, ante, § 411.

"It was proven that she could not read, and it was not shown that the will was read to her at the time it was executed, but it may have been before. She produced the will herself, declared it to be her will, asked the witnesses to attest it as such, and signed it by making her mark. She was a woman of good sense, particular about her business transactions,

presumption that a testator who duly executed his will, although he signs by making his mark, knows its contents, is not conclusive; but the presumption prevails in the absence of proof of fraud, undue influence, or want of testamentary capacity.⁶ Nor is it necessary that a testator understand the language in which the will is written, or its technical terms, in order to sustain its validity.⁷

§ 432. When Testator May Sign by Mark.

Although signing by mark is usually resorted to only in cases where the testator is unable to write his name, either through bodily weakness or by reason of ignorance of the art of writing, it has been held that the mark is sufficient, notwithstanding his ability to write.⁸

and manifested her usual soundness of mind at the time. It is not shown that she was laboring under any feebleness of mind from disease, or approaching dissolution. The provisions of her will appear to be reasonable. It is not shown that any imposition was practiced upon her, or that her sons had any agency in the preparation of the will. It was erroneous for the court to tell the jury as a matter of law that, it being shown that she could not read, it was necessary to prove that the will was read to her."—*Guthrie v. Price*, 23 Ark. 396, 407.

It is not necessary that the testator hear or read the will in the presence of the witnesses.—*Smith v. Ryan*, 136 Iowa 335, 112 N. W. 8.

⁶ *Lipphard v. Humphrey*, 209

U. S. 264, 14 Ann. Cas. 872, 52 L. Ed. 783, 28 Sup. Ct. 561.

See, ante, § 411.

⁷ *Conrades v. Heller*, 119 Md. 448, 87 Atl. 28; *Sansona v. Laraia*, 88 Conn. 136, 90 Atl. 28. See, also, § 38.

⁸ *Taylor v. Dening*, 3 Nev. & P. 228; s. c., *Baker v. Dening*, 8 Ad. & E. 94; *In re Field*, 3 Curt. 752; *In re Dombrowski's Estate*, 163 Cal. 290, 125 Pac. 233; *In re Clark's Estate*, 170 Cal. 418, 149 Pac. 828; *Smith v. Dolby*, 4 Har. (Del.) 350; *Ahnert v. Ahnert*, 98 Kan. 768, 160 Pac. 201; *Steele v. Marble*, 221 Mass. 485, 109 N. E. 357; *St. Louis Hospital Assn. v. Williams' Admr.*, 19 Mo. 609; *St. Louis Hospital Assn. v. Wegman*, 21 Mo. 17; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, 4 Am. Dec.

§ 433. Another May Guide the Hand of the Testator.

Where the testator is conscious and is desirous of signing his name, but is too feeble to do so unaided, upon being requested so to do by the testator, another may assist him by guiding his hand while making his mark or writing his name.⁹ And the testator's signature is valid, his name being signed by another and his hand being guided while he makes his mark.¹⁰ Neither the

330; *In re Corcoran's Will*, 145 App. Div. 129, 129 N. Y. Supp. 165; *In re Hersperger's Estate*, 245 Pa. St. 569, 91 Atl. 942; *Ray v. Hill*, 3 Strob. L. (S. C.) 297, 49 Am. Dec. 647; *Wilson v. Craig*, 86 Wash. 465, Ann. Cas. 1917B, 871, 150 Pac. 1179.

Compare: *Asay v. Hoover*, 5 Pa. St. 21, 45 Am. Dec. 713; *Grabill v. Barr*, 5 Pa. St. 441, 47 Am. Dec. 418; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567; *Main v. Ryder*, 84 Pa. St. 217.

⁹ *Bell v. Hughes*, 5 Law R. Ir. 407; *Wilson v. Beddard*, 12 Sim. 28; *Vines v. Clingfost*, 21 Ark. 309; *In re Mullin's Estate*, 110 Cal. 252, 258, 42 Pac. 645; *In re Clark's Estate*, 170 Cal. 418, 424, 149 Pac. 828; *Smith v. Dolby*, 4 Har. (Del.) 350; *Upchurch v. Upchurch*, 16 B. Mon. (55 Ky.) 102; *Succession of Carroll*, 28 La. Ann. 388; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Nickerson v. Buck*, 12 Cush. (Mass.) 332; *Estate of Miller*, 37 Mont. 545, 97 Pac. 935; *Butler v. Benson*, 1 Barb. (N. Y.) 526; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; *Chaffee v.*

Baptist Missionary Convention, 10 Paige (N. Y.) 85, 40 Am. Dec. 225; *In re Baumann's Will*, 85 Misc. Rep. 656, 148 N. Y. Supp. 1049; *In re Knight's Will*, 87 Misc. Rep. 577, 150 N. Y. Supp. 137; *Pool v. Buffum*, 3 Ore. 438; *Asay v. Hoover*, 5 Pa. St. 21, 45 Am. Dec. 713; *Flannery's Will*, 24 Pa. St. 502; *Cozzens' Will*, 61 Pa. St. 196; *Sprague v. Luther*, 8 R. I. 252; *Ray v. Hill*, 3 Strob. L. (S. C.) 297, 49 Am. Dec. 647.

"On the ground that whatever would be good as a signature, if made by the testator, must be equally good if made by his direction, an impression of his name stamped by his direction was held good, as a mark would also have been."—*Jenkyns v. Gaisford*, 3 Sw. & Tr. 93, 32 L. J. Prob. 122.

But see *Whitsett v. Belue*, 172 Ala. 256, 54 So. 677, where it was held that a will is not legally executed by a testator if some one else holds his pen hand during the performance.

¹⁰ *In re Clark's Estate*, 170 Cal. 418, 424, 149 Pac. 828.

fact that the testator communicated his wishes partly in pantomime and partly in answer to questions, nor the circumstance that the mechanical work of affixing his name to the will was performed by another, will invalidate the instrument.¹¹ The extent of the aid given the testator is immaterial if the signing is in any degree the act of the testator, acquiesced in and adopted by him. The question is whether the aid was in the nature of assistance or control, referring to the mental rather than the physical process. A testator may desire and will that his hand sign his name, yet the power to do so may be lacking. Another person may take his hand and guide and control its physical movements, yet if the testator has the conscious wish that his hand write his signature and he participates in any degree in the making of it, and adopts the signature thus made, it is sufficient.¹²

It has been said that if he is feeble or paralyzed, such assistance, as guiding his hand, may be given the testator without his actual request, for if he be fully cognizant of what is being done, and submit to having his hand guided so as to write his name, it is equivalent to an express direction to another to sign it for him.¹³ But where a testator, having lost the use of his hands, requested another to sign the will for him, and that other, through misapprehension of the law, refused so to do, the continued exertion at each opportunity to have the will signed, and the refusal, could not be construed as

¹¹ *In re Clark's Estate*, 170 Cal. 418, 424, 149 Pac. 828. See, also, *In re Mullin's Estate*, 110 Cal. 252, 258, 42 Pac. 645.

¹² *Matter of Kearney's Will*, 69 App. Div. 481, 74 N. Y. Supp. 1045; *In re Baumann's Will*, 85 Misc. Rep. 656, 148 N. Y. Supp. 1049;

Vandruff v. Rinehart, 29 Pa. St. 232; *Cozzens' Will*, 61 Pa. St. 196.

¹³ *Stevens v. Van Cleve*, 4 Wash. C. C. 262, 272, Fed. Cas. No. 13412.

Compare: *Van Hanswyck v. Wiese*, 44 Barb. (N. Y.) 494; *Vandruff v. Rinehart*, 29 Pa. St. 232.

equivalent to a compliance with the requisitions of the statute.¹⁴

§ 434. Testator's Name May Be Signed by Another: Express Direction or Consent.

Where the testator makes his mark, or writes his name, even though some one else holds his hand and directs its movements, he performs a physical act in signing his will. But if his name be wholly written by another, it can not stand as his signature unless by his direction or with his consent. Section 5 of the Statute of Frauds provided that every will of lands and tenements should be signed by the maker "or by some other person in his presence and by his express direction." This provision has been substantially copied into the statutes of practically all of the states. Where this provision exists, it is universally required that the person signing the testator's name for him must do so in the testator's presence. In many instances, however, the phrase, "by his express direction," has had eliminated from it the word "express"; in some instances the signing of the testator's name by another must be with the "consent" of the testator.¹⁵ In New Jersey and New York, the statutes provide for signing by the testator only, not by another for him.¹⁶ But a mark made by a third person for the testator, the testator having his hand on the pen at the time, would be a signing by the testator and would be sufficient.¹⁷ In Pennsylvania, a will must be signed

¹⁴ *Stricker v. Groves*, 5 Whart. (Pa.) 386.

¹⁵ See synopsis of statutes in appendix to this volume.

¹⁶ Compiled Statutes New Jersey (1910), begin. p. 5862, par. 24;

Consol. Laws of New York (1909), ch. 13, art. 1, § 21; *Matter of McElwaine's Will*, 18 N. J. Eq. 499.

¹⁷ *Campbell v. McGuiggan*, (N. J.) 34 Atl. 383.

by the testator unless he is prevented by his last sickness, in which event it may be signed by some other person in his presence and by his express direction.¹⁸ In Louisiana, the testament must be signed by the testator, but if he declares that he knows not how, or is unable to sign, another may sign for him, but express mention of his declaration and also of the cause which prevents him from signing must be set forth in the act of subscription.¹⁹ Where the statute allows the signing of the testator's name by some other person only by his "express direction," mere knowledge by the testator that his name is being signed by another, or that the signing was acquiesced in or consented to by the testator, would not be sufficient.²⁰

§ 435. The Same Subject.

The general rule is that the testator's name may, at his "direction," "express direction," or with "his consent," according to the wording of the statute, be affixed to his will by another, and the effect is the same as though written by the testator himself;²¹ but if the decedent had

¹⁸ Purdon's Digest, 13th ed. (Pa.), p. 5120; *Asay v. Hoover*, 5 Pa. St. 21, 45 Am. Dec. 713; *Grabill v. Barr*, 5 Pa. St. 441, 47 Am. Dec. 418; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567; *Main v. Ryder*, 84 Pa. St. 217.

Compare: *Armstrong's Exr. v. Armstrong's Heirs*, 29 Ala. 538; *Abraham v. Wilkins*, 17 Ark. 292; *Simpson v. Simpson*, 27 Mo. 288; *Vernon v. Kirk*, 30 Pa. St. 218; *Jenkins' Will*, 43 Wis. 610, 619.

¹⁹ La. Civ. Code, art. 1579.

²⁰ *Waite v. Frisbie*, 45 Minn.

361, 47 N. W. 1069; *Murry v. Hennessey*, 48 Neb. 608, 67 N. W. 470; *Asay v. Hoover*, 5 Pa. St. 21, 45 Am. Dec. 713; *Grabill v. Barr*, 5 Pa. St. 441, 47 Am. Dec. 418; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567; *Snyder v. Bull*, 17 Pa. St. 54, 60.

²¹ *In re Regan*, 1 Curt. 908; *Jenkyns v. Gaisford*, 3 Sw. & Tr. 93, 32 L. J. Prob. 122; *Riley v. Riley*, 36 Ala. 496; *Abraham v. Wilkins*, 17 Ark. 292; *Vines v. Clingfost*, 21 Ark. 309; *Herbert v. Berrier*, 81 Ind. 1; *Elston v. Montgomery*, 242

intended to add his mark to the signature to complete the same and had failed so to do, it is not a valid subscription.²² Even where the evidence does not show that the signature was made at his express request, by his acknowledgment thereof the testator may adopt the signature as his own and it will be presumed to have been made at his request.²³ The party who signs for the testator may first write his own name and after it the testator's, as "E. N. for R. D., at his request";²⁴ and, although he write his own name instead of the testator's it may still be considered a sufficient signing.²⁵ Where the person who was requested to sign for the testator wrote, "This will was read and approved by C. F. B., by C. C., in the presence of," and this was followed by the subscription of the witnesses, it was held a sufficient

Ill. 348, 26 L. R. A. (N. S.) 420, 90 N. E. 3; *Vandruuff v. Rinehart*, 29 Pa. St. 232.

Where the testator said to the draughtsman of the will: "You know I can not write. You will have to sign it for me," the request to sign was held sufficient. — *Isaac v. Halderman* (In re Isaac's Estate), 76 Neb. 823, 107 N. W. 1016.

A paper admitted to probate as a will is not to be attacked collaterally as not having been signed simply because in the space left for the mark, between the first and last names of the testator as written by another person, there has been no mark inserted. The testator need not have made a mark, but could have expressly re-

quested the person to sign for him; in such case it is to be presumed that the ordinary, in admitting the will to probate, was satisfied that this had been done. — *Robertson v. Hill*, 127 Ga. 175, 56 S. E. 289.

²² *Main v. Ryder*, 84 Pa. St. 217.

²³ *Herbert v. Berrier*, 81 Ind. 1, 3; *Upchurch v. Upchurch*, 16 B. Mon. (55 Ky.) 102; *Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579.

Compare: *Will of Cornelius*, 14 Ark. 675; *Flannery's Will*, 24 Pa. St. 502.

²⁴ *Abraham v. Wilkins*, 17 Ark. 292; *Robins v. Coryell*, 27 Barb. (N. Y.) 556; *Vernon v. Kirk*, 30 Pa. St. 218.

²⁵ *In re Clark*, 2 Curt. 329.

signing.²⁶ A testator who is blind may have his name signed for him the same as if he was not so afflicted.²⁷

§ 436. Who May Sign for the Testator.

A person competent to subscribe the will as witness is a fit person to write the testator's name for him;²⁸ and in all cases it is advisable for the person so signing for another to add his own name as witness. This is required by statute in Arkansas, California, Oregon, Washington, Dakota, and Montana,²⁹ and in Missouri and Arkansas.³⁰ In Dakota and Montana he must also state that it was at the testator's request.³¹

²⁶ In *re Blair*, 6 Notes of Cas. 528.

²⁷ In *Re Pickett's Will*, 49 Ore. 127, 89 Pac. 377, the will of a blind man was admitted to probate. The name of the testator was signed by his attorney, who wrote immediately following: "The name of G. W. P. written by G. B. D. at his request, and in his presence and the presence of the subscribing witnesses, the request being affirmative answers to questions by the attorney in the presence of the subscribing witnesses."

²⁸ *Herbert v. Berrier*, 81 Ind. 1, 3, citing *Smith v. Harris*, 1 Rob. Ecc. 262; *Robins v. Coryell*, 27 Barb. (N. Y.) 556; *Bolton v. Bolton*, 107 Miss. 84, 64 So. 967.

But see: In *re McElwaine's Will*, 18 N. J. Eq. 499.

One who signs the name of the testator at his request, may also act as a witness to a will.—*Steele*

v. Marble, 221 Mass. 485, 109 N. E. 357.

²⁹ *Stimson's Am. Stat. Law*, § 2644; *Pool v. Buffum*, 3 Ore. 438.

In Washington, the person who, by express request of the testator, signs the latter's name to the will, must also sign as an attesting witness and state that he signed for the testator. The absence of such a statement can, however, be raised as a question only when it is moved to admit the will to probate.—*Horton v. Barto*, 57 Wash. 477, 135 Am. St. Rep. 999, 107 Pac. 191.

³⁰ *Cornelius' Will*, 14 Ark. 675; *McGee v. Porter*, 14 Mo. 611, 55 Am. Dec. 129; *St. Louis Hospital Assn. v. Williams' Admr.*, 19 Mo. 609; *Northcutt v. Northcutt*, 20 Mo. 266; *St. Louis Hospital Assn. v. Wegman*, 21 Mo. 17; *Simpson v. Simpson*, 27 Mo. 288.

³¹ *Stimson's Am. Stat. Law*, § 2644.

§ 437. Testator Prevented From Signing by Act of God, Effect Of.

Where the formal execution of a will has been prevented by any circumstance which the law pronounces to be an act of God, the unexecuted paper may be admitted to probate,³² provided the testamentary intention of the intending signer continued up to the time when the so-called divine act intervened, and the paper was left unexecuted for such reason only and not through any purpose of abandonment;³³ and provided further that the paper be complete in all respects except as to the authenticating act, and make a full disclosure of the testamentary scheme of the testator.³⁴ In order that probate may be allowed to such an unexecuted paper, it need not have been physically impossible for the testator to have completed its execution; it is enough that the ob-

³² See, ante, § 47.

Ex parte Henry, 24 Ala. 638; Boofter v. Rogers, 9 Gill (Md.) 44, 52 Am. Dec. 680; Weems v. Weems, 19 Md. 334; Gaskins' Exrs. v. Gaskins, 25 N. C. 158; Miles' Will, 4 Dana (34 Ky.) 1; Showers v. Showers, 27 Pa. St. 485, 67 Am. Dec. 487; Lyles v. Lyles, 2 Nott. & McC. (S. C.) 531.

Compare: Rochelle v. Rochelle, 10 Leigh (Va.) 125.

Contra: Knapp v. Reilly, 3 Demarest (N. Y.) 427.

³³ Boofter v. Rogers, 9 Gill (Md.) 44, 52 Am. Dec. 680.

Where a person approved a paper read to him as his will, but failed to sign the same, for no graver reason than being exhausted and in a tremor because

of the hysterical condition of his wife at the time when he would have signed, the will was not admitted to probate.—In re Butler's Estate, 223 Pa. St. 252, 72 Atl. 508.

³⁴ Montefiore v. Montefiore, 2 Addams 354; Tabler v. Tabler, 62 Md. 601.

At an early date it was held that so much of an unfinished paper as was dictated while the deceased was of sound mind could be admitted.—Billinghurst v. Vickers, 1 Phillim. 187, 199; Wood v. Wood, 1 Phillim. 357; Nathan v. Morse, 3 Phillim. 529; Frierson v. Beall, 7 Ga. 438; but this was denied in the later cases. — Montefiore v. Montefiore, 2 Addams 354; Tabler v. Tabler, 62 Md. 601.

stacle was such as to account for its being left incomplete and is not suggestive of a change in the testamentary intention. A considerable time may intervene between the preparation of the will and the act of God which prevents its execution.³⁵

§ 438. The Same Subject: Proof Required.

Where an imperfect paper is propounded for probate, the proof must be clear that the testator intended it to take effect as his will.³⁶ In a case in which a deceased person had ordered a copy to be made of a draft of his will as prepared by his attorney and revised by himself and, upon receiving the copy, said he would think of it and examine it, and this copy was found after his death in his possession, unaltered and unexecuted, probate was considered to have been improperly allowed.³⁷

Under a statute in Pennsylvania requiring the will to be signed by the testator "unless prevented by the extremity of his last sickness,"³⁸ where a testator being just about to sign suddenly became unable either to do so or to request another to subscribe for him, probate was granted.³⁹ Yet in a case in New York it has been held that a will was not duly signed where a testator

³⁵ *Booffer v. Rogers*, 9 Gill (Md.) 44, 52 Am. Dec. 680; *Allen v. Manning*, 2 Addams 490; *Mason v. Dunman*, 1 Munf. (Va.) 456; *Phoebe v. Boggess*, 1 Grat. (Va.) 129, 42 Am. Dec. 543.

³⁶ *Jones v. Jones*, 3 Metc. (60 Ky.) 266.

³⁷ *Malone v. Harper*, 2 Stew. & P. (Ala.) 454.

³⁸ *Showers v. Showers*, 27 Pa. St. 485, 67 Am. Dec. 487.

In *Smith v. Beales*, 33 Pa. Sup. Ct. 570, a will was permitted to be proved on the testimony of two witnesses who were present at the time it was prepared, but which was never signed, because after the reading the testator died.

³⁹ *Showers v. Showers*, 27 Pa. St. 485, 67 Am. Dec. 487. See, also, *Ruoff's Appeal*, 26 Pa. St. 219.

after writing the first three letters of his name became unconscious.⁴⁰ In Tennessee it has been held that a will not sufficiently attested to devise land may be established as to personalty unless it appears not to have been complete, this being a question for the jury.⁴¹

§ 439. Power of Appointment Executed by Will

A power of appointment must be exercised by the donee of the power in the manner prescribed in the instrument granting the same. If required to be by deed, it can not be by will; but if there is no restriction as to the nature of the instrument, it may be either by will or deed.⁴² In the exercise of the power, the interest creating the same should be referred to, although it is not proof of the existence of the power.⁴³ A sufficient indication that the will is in the exercise of the power is (a) where there has been some reference in the will to the power, or (b) reference to the property which is the subject of the power to be executed, or (c) where the provision in the will or other instrument executed by the donee of the power would be ineffectual or a mere nullity; in other words, would have no operation except as an execution of the power.⁴⁴

⁴⁰ Knapp v. Reilly, 3 Demarest (N. Y.) 427.

⁴¹ Davis v. Davis, 6 Lea (74 Tenn.) 543.

Some of the cases seem to confine the rule to dispositions of personalty.—Davis v. Davis, 6 Lea (74 Tenn.) 543.

Compare: Weems v. Weems, 19 Md. 334; Orndorff v. Hummer, 12 B. Mon. (51 Ky.) 619.

⁴² Alder v. Jones, 98 Md. 101, 56

Atl. 487; Todd v. Sawyer, 147 Mass. 570, 17 N. E. 527.

⁴³ Hershey v. Berman, 45 Ark. 309; Kirkman v. Wadsworth, 137 N. C. 453, 49 S. E. 962.

⁴⁴ Blagge v. Miles, 1 Story (U. S.) 426, Fed. Cas. No. 1479, approved in Lee v. Simpson, 134 U. S. 572, 590, 33 L. Ed. 1038, 1046, 10 Sup. Ct. 631; Blake v. Hawkins, 98 U. S. 315, 326, 25 L. Ed. 139, 141; White v. Hicks, 33 N. Y. 383,

§ 440. The Same Subject: Formalities Required.

An instrument creating a power of appointment may provide that such power be executed only under prescribed formalities, and the general rule is that the exercise of the power must comply with such requirements.⁴⁵ If the power is to be exercised by will, such will must be executed with all the formalities required for the execution of such instruments, although the instrument creating the power does not otherwise prescribe the formalities.⁴⁶ In such case the formalities depend upon the *situs* of the property or the domicile of the grantor of the power, according to whether real or personal property may be involved.⁴⁷ If the instrument creating the power does not in terms specify that it is to be executed by will, leaving it to the discretion of the donee of the power as to the manner in which it may be exercised, but providing that it must be exercised with certain formalities, the general rule is that, if the power is ex-

392; *Funk v. Eggleston*, 92 Ill. 515, 34 Am. Rep. 136.

See, also, *Burdett v. Doe*, 10 Cl. & Fin. 340; *Newton v. Ricketts*, 9 H. L. Cas. 262.

⁴⁵ *Longford v. Eyre*, 1 P. Wms. 740; *Habergam v. Vincent*, 2 Ves. Jr. 204, 231; *Wright v. Wakeford*, 17 Ves. Jun. 454; *Barretto v. Young* (1900), 2 Ch. 339; *Wainwright v. Low*, 57 Hun (N. Y.) 386, 10 N. Y. Supp. 888; *Ketchin v. Rion*, 68 S. C. 260, 47 S. E. 376.

The presumption "*omnia rite acta*" does not prevail with respect to wills executed under powers. "There are some cases of wills executed under powers prescribing

certain forms, when it has been held that the proof must show that the forms have been complied with; and even though the witnesses be dead or can not remember, the presumption of compliance does not arise, unless the will itself or the attestation clause so states."—*Deupree v. Deupree*, 45 Ga. 415.

⁴⁶ *Wilkes v. Holmes*, 9 Mod. 485; *In re Daly*, 25 Beav. 456; *Sanders v. Franks*, 2 Madd. 147; *Blount v. Walker*, 134 U. S. 607, 33 L. Ed. 1036, 10 Sup. Ct. 606; *Van Wert v. Benedict*, 1 Bradf. (N. Y.) 114.

⁴⁷ See, ante, §§ 280, 289, 290.

executed by will, such execution must not only comply with the statutory requirements as to testamentary instruments but must also comply with the formalities demanded of the instrument creating the power.⁴⁸ If, for instance, the power may be exercised only by an instrument under seal, a will, though complying with the statutory requirements but not being sealed by the testator, is not a valid execution of the power.⁴⁹

§ 441. The Same Subject: Effect of the Statute of Wills of 1 Victoria, ch. 26.

In England, under the Statute of Wills of 1 Victoria, it was especially provided that no power of appointment exercised by will should be valid unless executed according to the formalities required for such instruments, but that no further formalities need be observed notwithstanding additional formalities were prescribed in the instrument granting the power.⁵⁰ The statute applies, however, only to the exercise of a power which has been specially directed to be exercised by will, and does not cover a case where the appointment may be made by any

⁴⁸ Taylor v. Meads, 4 De G. J. & S. 597, 11 Jur. N. S. 166.

⁴⁹ Martin v. Mitchell, 2 Jac. & W. 413, 425; Dormer v. Thurland, 2 P. Wms. 506; Taylor v. Johnson, 2 P. Wms. 504; Ross v. Ewer, 3 Atk. 156; MacAdam v. Logan, 3 Bro. C. C. 310.

⁵⁰ Statute of 1 Victoria, ch. 26, § 10, reads: "That no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner here-

inbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity."

instrument in writing.⁵¹ But where the power must be exercised by will, an instrument executed according to the formalities required for wills is sufficient, although the grant of the power may contain other requirements.⁵²

§ 442. The Same Subject: Time of Execution.

A will executed prior to the grant of a power of appointment to the testator can not operate as an exercise of such subsequently annulled power⁵³ unless the testator, by a codicil to such will after receiving the power, expressly republish his will as modified by the codicil.⁵⁴

⁵¹ *West v. Ray*, Kay 385, which disapproved the earlier case of *Buckell v. Blenkhorn*, 5 Hare 131.

⁵² *In re Blackburn*, 43 Ch. Div. 75; *In re Huber*, (1896) P. 209; *Wrigley v. Lowndes*, (1908) P. 348.

⁵³ *Leigh v. Norbury*, 13 Ves. Jun. 340; *In re Wells*, 42 Ch. Div. 646; *In re Hayes*, (1900) 2 Ch. 332; *In*

re Dunn's Appeal, 85 Pa. St. 94; *Matteson v. Goddard*, 17 R. I. 299, 21 Atl. 914.

Compare: *United States Trust Co. v. Chauncey*, 32 Misc. Rep. (N. Y.) 358, 66 N. Y. Supp. 563.

⁵⁴ *Willard v. Ware*, 10 Allen (Mass.) 263.

CHAPTER XVII.

NUMBER AND CHARACTER OF WITNESSES REQUIRED FOR THE EXECUTION OF WILLS.

- § 443. Written wills must be witnessed.
- § 444. Meaning of "attested" and "subscribed."
- § 445. Purpose of statutes requiring witnesses.
- § 446. Witnesses identify the will.
- § 447. Signing by testator should precede signing by witnesses.
- § 448. The same subject: When all part of one transaction.
- § 449. Witnesses must be mentally competent: As to age.
- § 450. Meaning of "credible" or "competent" as applied to witnesses.
- § 451. Persons interested under the will are disqualified as witnesses: Statute of 25 George II, ch. 6.
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- § 453. Heir at law as an attesting witness.
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- § 455. Executor as an attesting witness: Conflicting decisions.
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- § 458. Gifts to attesting witnesses void: Modifications of the rule.
- § 459. Husband or wife of a beneficiary as an attesting witness: Early rule.
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- § 461. The same subject: Rule in the United States.
- § 462. Number of witnesses required.
- § 463. Holographic wills: When witnesses not required.
- § 464. Purpose of statutes authorizing holographic wills.

- § 465. Other instruments not written by testator can not be incorporated in a holographic will.
- § 466. Holographic wills: How and where signed.
- § 467. The same subject: Meaning of "written by the hand of the testator."

§ 443. Written Wills Must Be Witnessed.

At common law, wills of personalty were not required to be witnessed, and this rule, although abolished in England by the statute of 1 Victoria, ch. 26, still exists where the common law prevails unmodified by statute.¹ In most jurisdictions, however, the statutes require that all written wills, other than holographic wills which in some jurisdictions are an exception, whether of real or of personal property, must be attested and subscribed by witnesses.² Except as required by statute, however, such formalities are unnecessary.³

§ 444. Meaning of "Attested" and "Subscribed."

The statutory requirement is generally that the will must be "attested and subscribed" by witnesses. Except

¹ *Brown v. Avery*, 63 Fla. 355, 376, *Ann. Cas.* 1914A, 90, 58 So. 34.

² See synopsis of statutes, Appendix, this volume.

A will is not entitled to probate, unless witnessed in the manner required by law.—In *re Plumel's Estate*, 151 Cal. 77, 121 *Am. St. Rep.* 100, 90 *Pac.* 192; *Schofield v. Thomas*, 236 Ill. 417, 86 *N. E.* 122.

As an illustration of the antiquity of the practice of attesting wills, it is said that recently some wills have been unearthed in Egypt which were made in the forty-

fourth year of the reign of Amenemhat III (B. C. 2550), and that they were witnessed by two scribes, with attestation clauses very similar to those now in use.—*Lane v. Lane*, 125 Ga. 386, 114 *Am. St. Rep.* 207, 5 *Ann. Cas.* 462, 54 *S. E.* 90.

³ *Brett v. Brett*, 3 *Addams Ecc.* 214, 224; *Limbery and Hyde v. Mason*, 2 *Comyns* 452; *Hilliard v. Binford's Heirs*, 10 Ala. 977; *Mealing v. Pace*, 14 Ga. 596; *Marston v. Marston*, 17 *N. H.* 503, 43 *Am. Dec.* 611.

as required by statute, these words are unnecessary. They are frequently used interchangeably, thus, an attesting witness means a subscribing witness.⁴ The term "attested" as commonly used in decisions with reference to attesting witnesses includes the act of certification by the actual subscription of the names of the attesting witnesses to the will. Therefore, when reference is made to "attesting witnesses," in decisions or in treatises on the subject, it is meant to include subscribing witnesses. This is the uniform construction as to all documents to which there are attesting witnesses.⁵ The word "attested" comes from two Latin words, *ad* and *testari*, and means literally "to bear witness to." The term "witnessed" includes subscription.⁶

Attestation and subscription have been distinguished. It has been said that "attestation is the act of the senses, subscription is the act of the hand; the one is mental, the other mechanical; and to attest a will is to know that it was published as such and to certify the facts required to constitute an actual and legal publication; but to subscribe a paper published as a will is only to write on

⁴ *Historical Society v. Kelker*, 226 Pa. St. 16, 134 Am. St. Rep. 1010, 74 Atl. 619.

⁵ *Wright v. Wakeford*, 4 Taunt. 213; *Doe d. Spilsbury v. Burdett*, 9 Adol. & E. 936; *Logwood v. Hussey*, 60 Ala. 417; *In re Shapter's Estate*, 35 Colo. 578, 584, 117 Am. St. Rep. 216, 6 L. R. A. (N. S.) 575, 85 Pac. 688; *International Trust Co. v. Anthony*, 45 Colo. 474, 16 Ann. Cas. 1087, 22 L. R. A. (N. S.) 1002, 101 Pac. 781; *McGuire v. Church*, 49 Conn. 248; *White v. Magarahan*, 87 Ga. 217, 13 S. E.

509; *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368; *Gibson v. Nelson*, 181 Ill. 122, 72 Am. St. Rep. 254, 54 N. E. 901; *O'Brien v. Bonfield*, 213 Ill. 428, 72 N. E. 1090; *Grinnell v. Baxter*, 17 Pick. (Mass.) 386; *Gerrish v. Nason*, 22 Maine 438, 39 Am. Dec. 589; *Shaw v. Smith*, 150 Mass. 166, 6 L. R. A. 348, 22 N. E. 887.

⁶ *International Trust Co. v. Anthony*, 45 Colo. 474, 16 Ann. Cas. 1087, 22 L. R. A. (N. S.) 1002; 101 Pac. 781, 782.

the same paper the names of the witnesses, for the sole purpose of identification." There may be a perfect attestation in fact without subscription.⁷ To "subscribe," when used in connection with attesting a will, means that the witnesses shall sign their names to the same paper for the purpose of identification and implies that attestation has been performed.⁸ For such reasons both of the words, attested and subscribed, are to be found in the statutes,⁹ however, in decisions and in text-books regarding the execution of wills, for the sake of brevity and sanctioned by general usage, the terms "attesting witnesses" and "subscribing witnesses" are used interchangeably and in every instance have reference to witnesses who have attested and subscribed the will.

§ 445. Purpose of Statutes Requiring Witnesses.

In making it requisite to the validity of a will that there shall be witnesses who shall subscribe their names to the writing, the law has a threefold purpose: The identification of the paper,¹⁰ the protection of the testator from fraud and deception so that he may freely and voluntarily express his testamentary intent,¹¹ and the ascer-

⁷ *Swift v. Wiley*, 1 B. Mon. (40 Ky.) 114. See, also, *Tobin v. Haack*, 79 Minn. 101, 81 N. W. 758; *In re Downie's Will*, 42 Wis. 66, 76. See, also, dissenting opinion of Mansfield, C. J., in *Wright v. Wakeford*, 4 Taunt. 213.

⁸ *Brengle v. Tucker*, 114 Md. 597, 80 Atl. 224.

⁹ *Grayson v. Atkinson*, 2 Ves. Sen. 454.

¹⁰ *Canada's Appeal*, 47 Conn. 450.

See, ante, § 405, as to reasons for statutory formalities of execution.

¹¹ *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565; *Auburn Seminary Trustees v. Calhoun*, 25 N. Y. 222; *In re Martin's Will*, 82 Misc. Rep. 574, 144 N. Y. Supp. 174.

tainment of the testamentary capacity of the testator.¹² Witnesses are required for the purpose of seeing, in the first instance, that the testator was in such a mental condition as would enable him to make his will, and that he executed it under free conditions and in conformity with the law regulating testamentary dispositions. If a witness doubt the testamentary capacity of a testator he should not attest or subscribe the will.¹³

§ 446. Witnesses Identify the Will.

Witnesses, by subscribing the instrument, can thus identify it. One purpose for which witnesses are demanded is that of attesting and identifying the signature of the testator; and, in order to do this, it is essential that they should see the testator sign his name, or that the signature be shown to them and acknowledged to them by the testator to be his.¹⁴ Under modern practice in England and in a majority of the United States of America, the attestation of the witnesses is primarily to the signature of the testator, to enable them to testify that the deceased subscribed his name to the identical piece of paper on which they wrote their own.¹⁵ It is not neces-

¹² *Heyward v. Hazard*, 1 Bay (S. C.) 335; *Withinton v. Withinton*, 7 Mo. 589.

¹³ *Scribner v. Crane*, 2 Paige (N. Y.) 147, 21 Am. Dec. 81; *In re Schmidt's Will*, 139 N. Y. Supp. 464, 477; *In re Martin's Will*, 82 Misc. Rep. 574, 144 N. Y. Supp. 174; *Mordecai v. Canty*, 86 S. C. 470, 68 S. E. 1049.

See, ante, § 375, subscribing witnesses should satisfy themselves that the testator is of sound mind.

¹⁴ *In re Keeffe's Will*, 155 App. Div. 575, 141 N. Y. Supp. 5; *Matter of Mackay*, 110 N. Y. 611, 6 Am. St. Rep. 409, 1 L. R. A. 491, 18 N. E. 433; *Matter of Laudy's Will*, 148 N. Y. 403, 42 N. E. 1061.

¹⁵ *Ross v. Ewer*, 3 Atk. 156; *Moodie v. Reid*, 7 Taunt. 355, 361; *Doe ex dem. Spilsbury v. Burdett*, 4 Ad. & E. 14; s. c., 6 Man. & G. 386; s. c., 10 Clark & F. 340; *Keigwin v. Keigwin*, 3 Curt. 607; s. c., 7 Jur. 840; *Faulds v. Jackson*, 6

sary that there should be a formal attestation clause.¹⁶ Where one of the witnesses, being a clerk of court, attached his official certificate of acknowledgment of the testator's signature, it was held sufficient.¹⁷

§ 447. Signing by Testator Should Precede Signing by Witnesses.

Until a testamentary document has been signed by the testator or by another for him at his direction or by his consent, as the statutes of the various jurisdictions may require, it is no will. Signing is necessary to complete the expression of the testamentary intent of the testator. The general rule is that the signing by the maker must precede signing by the witnesses, since it is impossible to bear witness to a future event.¹⁸ Even in those

Notes of Cas. Supp. 1; *Willis v. Lowe*, 5 Notes of Cas. 432; *Wyndham v. Chetwynd*, 1 Burr. 414, 421; *Bond v. Seawall*, 3 Burr. 1775; *White v. Trustees of British Museum*, 6 Birg. 310; s. c., 3 Moore & P. 689; *Trimmer v. Jackson*, 4 Burn's Ecc. Law (3 ed.) 102; *Canada's Appeal*, 47 Conn. 450; *In re Hulse's Will*, 52 Iowa 662, 3 N. W. 734; *Flood v. Pragoff*, 79 Ky. 607.

¹⁶ *Burgoyne v. Showler*, 1 Rob. Ecc. 5; *Bryan v. White*, 2 Rob. Ecc. 315; s. c., 14 Jur. 919; *Moale v. Cutting*, 59 Md. 510; *Murray v. Murphy*, 39 Miss. 214; *Jackson v. Christman*, 4 Wend. (N. Y.) 277; *In re Phillips*, 98 N. Y. 267.

¹⁷ *Franks v. Chapman*, 64 Tex. 159.

¹⁸ *Duffie v. Corridon*, 40 Ga. 122;

Brooks v. Woodson, 87 Ga. 379, 14 L. R. A. 160, 13 S. E. 712; *Lane v. Lane*, 125 Ga. 386, 114 Am. St. Rep. 207, 5 Ann. Cas. 462, 54 S. E. 90; *Welty v. Welty*, 8 Md. 15; *Chase v. Kittredge*, 11 Allen (Mass.) 49, 87 Am. Dec. 687; *Marshall v. Mason*, 176 Mass. 216, 79 Am. St. Rep. 305, 57 N. E. 340; *Barnes v. Chase*, 208 Mass. 490, 94 N. E. 694; *In re Kunkler's Will*, 147 N. Y. Supp. 1094; *Ragland v. Huntingdon*, 23 N. C. 561, 563; *In re Cox's Will*, 46 N. C. 321; *In re Pope's Will*, 139 N. C. 484, 111 Am. St. Rep. 813, 4 Ann. Cas. 635, 7 L. R. A. (N. S.) 1193, 52 S. E. 235; *Table-rock Lumber Co. v. Branch*, 158 N. C. 251, 73 S. E. 164; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280.

jurisdictions where the signature of the testator may be signed in any portion of the will, although a testator may have written his name in the *exordium* clause, if the evidence shows that he intended to sign the will at the end but did not do so until after it had been subscribed by the witnesses, a will so executed is invalid. No signature can stand as a signing of a will unless it be so intended by the testator.¹⁹

See, post, §§ 496, 497. Witnesses should sign after testator.

Where the testator before signing his will had it signed by one witness, and thereafter had it signed by a second witness without the first one being present, then signed the will himself, but made no acknowledgment of his signature to the first witness, the will was held invalid.—*Limbach v. Bolin*, 169 Ky. 204, 183 S. W. 495.

Where both witnesses testified that the testator did not sign in their presence, that they did not see his signature when they signed, and that neither he nor any one else for him intimated to the witnesses that he had as yet signed, the will was denied probate.—*Bioren v. Nesler*, 77 N. J. Eq. 560, 78 Atl. 201.

A will written by a person not the testator, and signed by him as a witness before its being left by him at the testator's residence, after which time such person never again saw the testator, was denied probate.—*In re Baldwin's Will*, 146 N. C. 25, 125 Am. St. Rep. 466, 59 S. E. 163.

¹⁹ In *Barnes v. Chase*, 208 Mass. 490, 94 N. E. 694, the court says:

"The difference between the case made out in this suit and that made out in *Meads v. Earle*, 205 Mass. 553, 29 L. R. A. (N. S.) 63, 91 N. E. 916, is to be found in the statement made by Elizabeth on her return to the Colony kitchen five minutes after the attesting witnesses had subscribed their names to the instrument now propounded as her last will, namely: 'I forgot to sign my name to my will.' That remark showed that she did not write her name in the *exordium* clause, intending it to stand as her signature to the will when complete. It is apparent that when the attesting witnesses subscribed their names, the instrument had not been signed, and that if it be assumed that in subsequently filling in her name in the *testimonium* clause Elizabeth did sign the instrument, the attesting witnesses did not afterwards subscribe their names."

See, also, *Sears v. Sears*, 77 Ohio St. 104, 11 Ann. Cas. 1008, 17 L. R. A. (N. S.) 353, 82 N. E. 1067.

§ 448. The Same Subject: When All Part of One Transaction.

It has been held, however, that where the signing by the witnesses and the testator is all part of the same transaction and all took place at the same time, a will is not invalidated by the fact that, in point of actual time, the attestation preceded the signing by the testator.²⁰ As to what constitutes the same transaction and the same time is a matter for judicial determination, depending upon the facts in each particular case, and can not be governed by any general rule.²¹

§ 449. Witnesses Must Be Mentally Competent: As to Age.

Witnesses to a will must be mentally competent. They must possess those qualifications which would render their testimony admissible if they were called upon to

See, ante, §§ 423-426, as to effect of part of the will following the signatures of the testator or the witnesses.

²⁰ In *re Silva's Estate*, 169 Cal. 116, 145 Pac. 1015; In *re Shapter's Estate*, 35 Colo. 578, 117 Am. St. Rep. 216, 6 L. R. A. (N. S.) 575, 85 Pac. 688; *O'Brien v. Gallagher*, 25 Conn. 229; *Gibson v. Nelson*, 181 Ill. 122, 72 Am. St. Rep. 254, 54 N. E. 901.

See, post, §§ 496, 497.

²¹ In *re Baldwin's Will*, 67 Misc. Rep. 329, 124 N. Y. Supp. 612, the court says: "Where the witnesses have signed in advance of the testator, their signatures may conceivably become an attestation of his subscription if it be thereafter supplied." The court then quotes *Mr. Surrogate Bradford in*

Vaughan v. Burford, 3 Bradf. Sur. (N. Y.) 78: "The particular order of the several requisites to the valid execution of a testament is not at all material, provided they are done at the same time; that is, part of the same transaction. What is the same time and the same transaction is a subject of judicial determination in each particular case, depending upon the facts, incapable of being governed by any general rule."

But compare *Lane v. Lane*, 125 Ga. 386, 114 Am. St. Rep. 207, 5 Ann. Cas. 462, 54 S. E. 90, and cases there cited, to the effect that "to witness a future event is equally impossible, whether it occur the next moment or the next week."

testify on ordinary occasions. As a general rule, the age of an attesting witness is considered only with reference to intelligence. All witnesses must possess understanding, and no arbitrary rule can be laid down. The statutes of the various states, with regard to witnesses generally, usually provide that children under a fixed age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly, can not be witnesses.²² In some jurisdictions the age limit of witnesses to wills is fixed by statute;²³ but in the absence of a statutory limitation the competency of the witness, irrespective of his age, is to be determined by the court. If competent when the will is offered for probate, a subscribing witness may be sworn; but whether or not such witness was competent when the will was executed is a separate question, and the court must determine whether or not the witness, when he attested the will, had sufficient mentality or understanding to be a competent witness. The mere fact of age does not determine the question.²⁴

²² Cal. Civ. Code, § 1880.

The rule which formerly obtained in England that as a child could not be examined except under oath, its evidence was excluded unless it understood the nature of an oath, is not the rule as to competency in California.—*Estate of Johnson*, 98 Cal. 531, 549, 21 L. R. A. 380, 33 Pac. 460.

²³ Arizona Rev. Stats., § 1206. Witnesses must be "above the age of fourteen years."

Louisiana, *Merrick's Rev. Civ. Code*, (1913) art. 1591. Children who have not obtained the age of

sixteen years complete, and persons insane, deaf, dumb, or blind, are among those who are specified as being absolutely incapable of being witnesses to testaments. See, also, *Oglesby v. Turner*, 127 La. 1093, 54 So. 400.

Texas, *Vernon's Sayles' Civ. Stats.*, (1914) art. 7857. Witnesses must be "above the age of fourteen years."

²⁴ It will not be held that a will was improperly executed simply because one of the witnesses to its execution was less than fourteen years of age. If otherwise

§ 450. Meaning of "Credible" or "Competent" as Applied to Witnesses.

The Statute of Frauds required that wills should be attested and subscribed by "credible" witnesses. Generally speaking, a "credible" witness is a "competent" witness.²⁵ Both words are found in the various wills acts and

competent, such witness may testify concerning the execution of a will, the same as to any other fact.—*Spier v. Spier* (In re *Spier's Estate*), 99 Neb. 853, L. R. A. 1916E, 692, 157 N. W. 1014, Syl.

A will is not invalidated by the fact that one of the witnesses is under fourteen years of age.—*Spier v. Spier* (In re *Spier's Estate*), 99 Neb. 853, L. R. A. 1916E, 692, 157 N. W. 1014.

In *Carlton v. Carlton*, 40 N. H. 14, the court says: "The general rule, in common law trials, is, that the competency of witnesses is to be decided by the court, and that the examination of a child, to ascertain his competency to be sworn as a witness, is made by the judge at his discretion. . . . If the attesting witnesses are competent at the time of probate, they may be sworn. Whether they were competent at the time of the attestation is a question entirely distinct and separate from the question of their competency at the time of probate. There is no more reason to confine the judge of probate to the examination of a witness at the probate, to determine whether such witness

were competent at the time of attestation, than to limit the judge to the testimony of any witness upon any other question. Whether, at the probate, an attesting witness is incompetent to be sworn, by reason of deficiency of understanding arising from immaturity of intellect, insanity, or intoxication, is a question to be determined by the judge on proper evidence."

25 *Smith v. Crotty*, 112 Ga. 905, 38 S. E. 110; *Matter of Noble* (*Robinson v. Savage*), 124 Ill. 266, 15 N. E. 850; *Sloan v. Sloan*, 184 Ill. 579, 56 N. E. 952; *O'Brien v. Bonfield*, 213 Ill. 428, 72 N. E. 1090; *Jones v. Grieser*, 238 Ill. 183, 15 Ann. Cas. 787, 87 N. E. 295; *Fearn v. Postlethwaite*, 240 Ill. 626, 88 N. E. 1057; *Smith v. Goodell*, 258 Ill. 145, 101 N. E. 255; *Hiatt v. McColley*, 171 Ind. 91, 85 N. E. 772; *Warren v. Baxter*, 48 Me. 193; *Appeal of Clark*, 114 Me. 105, Ann. Cas. 1917A, 837, 95 A.1. 517; *Sullivan v. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356; *Swanzy v. Kolb*, 94 Miss. 10, 136 Am. St. Rep. 568, 18 Ann. Cas. 1089, 46 So. 549; *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565; In re *Carson's Estate*,

have been construed to have the same meaning. A credible or competent witness is one who is not disqualified because of mental deficiency or interest or because of legal disability imposed, such as conviction for certain crimes.²⁶

244 Pa. St. 401, 90 Atl. 719; *Historical Society v. Kelker*, 226 Pa. St. 16, 134 Am. St. Rep. 1010, 74 Atl. 619; *In re Potter's Will*, 89 Vt. 361, 95 Atl. 646.

²⁶ *Fearn v. Postlethwaite*, 240 Ill. 626, 88 N. E. 1057; *Swanzy v. Kolb*, 94 Miss. 10, 136 Am. St. Rep. 568, 18 Ann. Cas. 1089, 46 So. 549; *Historical Society v. Kelker*, 226 Pa. St. 16, 134 Am. St. Rep. 1010, 74 Atl. 619.

A credible witness to the execution of a will, within the meaning of a statute requiring the witnesses to be "credible," is one legally competent to testify in a court of justice to the facts which he attests by subscribing his name to the will.—*O'Brien v. Bonfield*, 213 Ill. 428, 72 N. E. 1090; *Jones v. Grieser*, 238 Ill. 183, 15 Ann. Cas. 787, 87 N. E. 295.

The Registrar of Wills in Delaware is held to be competent to act as an attesting witness.—*In re Lecarpentier's Will (Del. Orph.)*, 91 Atl. 204.

Devisees and legatees under a will are interested witnesses.—*Wiley v. Gordon*, 181 Ind. 252, 104 N. E. 500; *In re Leech's Estate*, 236 Pa. St. 57, 84 Atl. 594.

A witness who for any legal reason is disqualified from giving testimony generally, or by reason of interest or other disqualifying

cause is incompetent to testify in respect to the particular subject under investigation, is not a credible witness under the statute of wills.—*Boyd v. McConnell*, 209 Ill. 396, 70 N. E. 649; *Jones v. Grieser*, 238 Ill. 183, 15 Ann. Cas. 787, 87 N. E. 295.

Whether a witness has such legal interest as will disqualify him, depends on whether he will gain or lose financially as the direct results of the suit.—*Smith v. Goodell*, 258 Ill. 145, 101 N. E. 255.

A competent witness is one competent to testify generally in courts of justice, and laboring under no legal disqualification.—*Hiatt v. McColley*, 171 Ind. 91, 85 N. E. 772.

A competent witness is one who, at the time of his subscribing the will in attestation, can legally testify as to the matters upon which his attestation bears.—*Wiley v. Gordon*, 181 Ind. 252, 104 N. E. 500; *In re Wiese's Estate*, 98 Neb. 463, L. R. A. 1915E, 832, 153 N. W. 556.

A person does not, by signing the will for the testator by his express request, disqualify himself as an attesting witness to the will.—*Steele v. Marble*, 221 Mass. 485, 109 N. E. 357.

Nebraska.—Under the Nebraska law, a devisee may act as a wit-

It was at first an unsettled question whether a witness who lacked credibility at the time of attestation could thereafter become credible, as, for instance, where such witness was disqualified at the time the will was made because of his interest, but thereafter released the same prior to the time the instrument was offered for probate.²⁷ But now the generally accepted rule is that witnesses to a will must be competent at the time of attestation,²⁸ and it is equally the accepted rule that incom-

ness.—In *re Wiese's Estate*, 98 Neb. 463, L. R. A. 1915E, 832, 153 N. W. 556.

A "disinterested witness" is one to whom the will gives no legal interest, and a "credible witness" one who is not discredited from testifying.—In *re Carson's Estate*, 244 Pa. St. 401, 90 Atl. 719.

Tennessee.—A legatee under a will of personal property is not rendered incompetent by his interest to testify as a witness to prove the factum or execution of the will. His interest only goes to the credibility of his evidence, and not to his competency as a witness.—*State v. Goodman*, 133 Tenn. 375, 181 S. W. 312, 318. See, also, *Beadles v. Alexander*, 68 Tenn. (9 Baxt.) 604; *Franklin v. Franklin*, 90 Tenn. 44, 16 S. W. 557; *Orgain v. Irvine*, 100 Tenn. 193, 194, 43 S. W. 768.

²⁷ *Doe d. Hindson v. Kersey*, 4 Burn's Ecc. Law 27; *Wyndham v. Chetwynd*, 1 Burr. 414; *Deakins v. Hollis*, 7 Gill & J. (Md.) 311; *Weems v. Weems*, 19 Md. 334; *Kerns v. Soxman*, 16 Serg. & R.

(Pa.) 315; *Nixon v. Armstrong*, 38 Tex. 296.

Where a witness is disqualified by reason of interest to act as attesting witness to a will, he can not be subsequently rendered competent by releasing or relinquishing any interest under the will.—*Smith v. Goodell*, 258 Ill. 145, 101 N. E. 255.

Contra: A witness who is incompetent by reason of interest under the will, may by renouncing such interest render himself competent.—*Murphy v. Clancy*, 177 Mo. App. 429, 163 S. W. 915.

²⁸ *Holdfast v. Dowsing*, 2 Stra. 1254; *Hatfield v. Thorp*, 5 B. & Ald. 589; *Gillis v. Gillis*, 96 Ga. 1, 51 Am. St. Rep. 121, 30 L. R. A. 143, 23 S. E. 107; *Johnson v. Johnson*, 187 Ill. 86, 58 N. E. 237; *O'Brien v. Bonfield*, 213 Ill. 428, 72 N. E. 1090; *Fearn v. Postlethwaite*, 240 Ill. 626, 88 N. E. 1057; *Rowlett v. Moore*, 252 Ill. 436, Ann. Cas. 1912D, 346, 96 N. E. 835; In *re Delavergne's Will*, 259 Ill. 539, 102 N. E. 1081; *Wisehart v. Applegate*, 172 Ind. 313, 88 N. E. 501; *Pat-*

petency subsequently arising will not affect the validity of the attestation.²⁹

ten v. Tallman, 27 Me. 17; In re Trinitarian Cong. Church, etc., of Castine, 91 Me. 416, 422, 40 Atl. 325; Appeal of Clark, 114 Me. 105, Ann. Cas. 1917A, 837, 95 Atl. 517; Sullivan v. Sullivan, 106 Mass. 474, 8 Am. Rep. 356; In re Holt's Will, 56 Minn. 33, 45 Am. St. Rep. 434, 22 L. R. A. 481, 57 N. W. 219; Geraghty v. Kilroy (Tierney's Estate), 103 Minn. 286, 114 N. W. 838; In re Wiese's Estate, 98 Neb. 463, L. R. A. 1915E, 832, 153 N. W. 556; Carlton v. Carlton, 40 N. H. 14, 18; Cochran v. Brown, 76 N. H. 9, 78 Atl. 1072, 1078; Historical Society v. Kelker, 226 Pa. St. 16, 134 Am. St. Rep. 1010, 74 Atl. 619; Smith v. Jones, 68 Vt. 132, 34 Atl. 424; In re Potter's Will, 89 Vt. 361, 95 Atl. 646; Bruce v. Shuler, 108 Va. 670, 15 Ann. Cas. 887, 35 L. R. A. (N. S.) 686, 62 S. E. 973.

Where at the time of the execution of the will the witness is disqualified, the subsequent amendment of the statute so as to remove the disqualification of witnesses of the class in question, can not affect the invalidity of the will.—Rowlett v. Moore, 252 Ill. 436, Ann. Cas. 1912D, 346, 96 N. E. 835.

"If the will provides a pecuniary benefit to the attesting witness, though dependent upon the happening of an event which may happen, he has a beneficial interest under it, in contemplation of law;

and if the subsequent event upon which the interest depends does not happen, that fact does not relate back and restore competency. It is important that the safeguards which the law has thrown around the execution of wills should not be withdrawn or weakened; and to that end a will which provides a pecuniary benefit, absolute or contingent, to a legatee, should not be witnessed by such legatee. He is interested, and therefore not credible or competent."—In re Klein's Estate, 35 Mont. 185, 88 Pac. 798, 805.

²⁹ Brograve v. Winder, 2 Ves. Jun. 634, 636; In re Delavergne's Will, 259 Ill. 589, 102 N. E. 1081; Davenport v. Davenport, 116 La. 1009, 114 Am. St. Rep. 575, 41 So. 240; Sears v. Dillingham, 12 Mass. 358, 359; Holmes v. Holloman, 12 Mo. 535; In re Holt's Will, 56 Minn. 33, 45 Am. St. Rep. 434, 22 L. R. A. 481, 57 N. W. 219; Geraghty v. Kilroy (Tierney's Estate), 103 Minn. 286, 114 N. W. 838; Smith v. Goodell, 258 Ill. 145, 101 N. E. 255.

The competency of an attesting witness is to be determined from the facts as they exist at the time he attests the will, and not as they exist at the time the will is offered for probate.—Fisher v. Spence, 150 Ill. 253, 41 Am. St. Rep. 360, 37 N. E. 314; Jones v. Grieser, 238

§ 451. Persons Interested Under the Will Are Disqualified as Witnesses: Statute of 25 George II, Ch. 6.

It has always been a general policy of the law that wills ought not to be established upon the testimony of those having a direct interest therein. Under the Statute of Frauds, however, considerable doubt arose as to the interest which would disqualify a person from being an attesting witness. Under that statute, if a witness was disqualified and there were not a sufficient number of credible witnesses without him, the entire will was invalidated, although it was argued that such a witness might prove the will except as to the devise in his favor.³⁰ It was deemed better that a subscribing witness should forfeit his interest under the will rather than destroy all the testamentary dispositions made by a testator, and further, to remove all doubts as to who might be credible witnesses Parliament enacted the statute of 25 George II, ch. 6. This act provided that if any person should attest the execution of any will or codicil made after June 24, 1752, to whom shall be given or made any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, other than charges on lands for the payment of any debts, such devise, leg-

III. 183, 15 Ann. Cas. 787, 87 N. E. 295.

If the witness has no interest at the time the will is executed, it will not be invalidated by his acquiring an interest through a subsequent codicil. — *Historical Society v. Kelker*, 226 Pa. St. 16, 134 Am. St. Rep. 1010, 74 Atl. 619.

The statute of 1 Victoria, ch. 26, laid down fixed rules as to subscribing witnesses. Section 14 of

that statute enacted "that if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid."

³⁰ Bacon's Abr., Tit. Wills, D., III.

acy, appointment or the like, should be utterly null and void so far only as concerned such persons attesting the execution of such will or codicil, or any person claiming under him: and such person was admitted as a witness to the execution of such will or codicil within the intent of the act of 29 Charles II, ch. 3, notwithstanding any devise, legacy, appointment, or the like in his favor.

§ 452. The Same Subject: Beneficiary May Be a Witness Against the Will.

The statute of 25 George II, ch. 6, as we have seen, affected the credibility of witnesses who took an interest directly under the will. At that date wills of real property only were affected by the Statute of Frauds. The statute first mentioned established the competency of devisees and legatees under a will by destroying their interests. Legatees, however, could always be witnesses against a will. The reason for denying them competency is that such a witness is presumed to be affected by self-interest; whereas, on the other hand, if a legatee testified against a will he would be swearing against his interest and the evidence would therefore be accepted.³¹ And it has been said that if not affected by the outcome, their interests being the same whether the will is sustained or not, such witnesses although legatees are credible.³²

31 *Oxenden Bar v. Penerice*, 2 Salk. 691, 695; *Smalley v. Smalley*, 70 Me. 545, 35 *Am. Rep.* 353; *In re Hoppe's Will*, 102 Wis. 54, 78 N. W. 183; *Sparhawk v. Sparhawk*, 10 Allen (Mass.) 155.

32 *Dan v. Brown*, 4 Cow. (N. Y.)

483, 15 *Am. Dec.* 395; *Jackson v. Betts*, 6 Cow. (N. Y.) 377; *Jackson v. Vickory*, 1 Wend. (N. Y.) 406, 19 *Am. Dec.* 522; *Jackson v. Le Grange*, 19 Johns. (N. Y.) 386, 10 *Am. Dec.* 237.

§ 453. Heir at Law as an Attesting Witness.

An heir has been distinguished from an attesting witness who has no claim upon the testator's bounty. Being entitled under the laws of inheritance to receive the estate of the decedent or some definite portion of it, many of the states have enacted statutes reserving to him his interests should he attest and subscribe the will of one from whom he will inherit. It has been extended to all those who would succeed, in any proportion, to the property of a decedent, the statutes generally providing that should such a one be a subscribing witness, neither the will nor inheritance is invalidated, but the heir or successor is accepted as a competent witness and is entitled to receive such share of the estate as he would have received had the decedent died intestate, generally restricted, however, so that such share can not exceed the amount given him by the will.³³ If against his interest, an heir is accepted as a competent witness; as, for instance, he may testify in favor of a will in which he was disinherited, either wholly or partially.³⁴

§ 454. Interest, to Disqualify a Witness, Must Be a Direct and Beneficial Interest.

The interest of a subscribing witness, referred to in the statute of 25 George II, ch. 6, was a direct, beneficial interest under the will, and the act was held not to include those witnesses who took property by devise or bequest only in trust for the benefit of others.³⁵ This

³³ See synopsis of statutes, Appendix, this volume.

³⁴ *Smalley v. Smalley*, 70 Me. 545, 35 Am. Rep. 353; *Sparhawk v. Sparhawk*, 10 Allen (Mass.) 155;

In re Hoppe's Will, 102 Wis. 54, 78 N. W. 183.

³⁵ *Doe d. Hindson v. Kersey*, 4 Burn's Ecc. Law 88; *Clarke v. Gannon*, 1 Ry. & Moo. Ca. 31;

rule still obtains, and a person is not excluded from subscribing a will as an attesting witness because of interest if such interest as he has under the will is uncertain, remote or contingent.³⁶ One is not incompetent as a witness to a will merely because the instrument contains some devise or legacy which is of material benefit to the city or town in which the witness resides and pays taxes. The interest in a will which renders a witness incompetent must be a fixed, certain, and vested pecuniary interest.³⁷ A member of a church or religious organization has not such an interest in its meeting house as to disqualify him as a witness to a will under which his church or organization is a beneficiary. The privilege of attending public worship, although most important, does not constitute such an interest as will disqualify a witness.³⁸ This rule applies generally to the officers or trustees of religious, educational, or charitable organizations which may be legatees under the will, where a subscribing

Lowe v. Jolliffe, 1 W. Bl. 365; *Bet-tison v. Bromley*, 12 East 250; *Wyman v. Symmes*, 10 Allen (Mass.) 153.

³⁶ *Weston v. Elliott*, 72 N. H. 433, 440, 57 Atl. 336; *Pruyn v. Brinkerhoff*, 57 Barb. (N. Y.) 176.

³⁷ *Cornwell v. Isham*, 1 Day (Conn.) 35, 2 Am. Dec. 50; *Goodrich's Appeal*, 57 Conn. 275, 18 Atl. 49; *Piper v. Moulton*, 72 Me. 155; *In re Marston*, 79 Me. 25, 8 Atl. 87; *Hawes v. Humphrey*, 9 Pick. (Mass.) 350, 20 Am. Dec. 481; *Haven v. Hilliard*, 23 Pick. (Mass.) 10; *Hitchcock v. Shaw*, 160 Mass. 140, 35 N. E. 671; *In re Potter's Will*, 89 Vt. 361, 95 Atl. 646.

³⁸ *Warren v. Baxter*, 48 Me. 193;

Hawes v. Humphrey, 9 Pick. (Mass.) 350, 361, 20 Am. Dec. 481.

Where the testatrix left a portion of her estate to a church of which she was a member, another member of the church is not disqualified by interest from becoming a witness.—*Conrades v. Heller*, 119 Md. 448, 87 Atl. 28.

One who has no interest as legatee or devisee under a will, and does not derive any pecuniary benefit or advantage under its provisions, and is not at the time of attestation in any religious or charitable institution made the object of the testator's bounty, is not disqualified as an attesting witness, merely because he is ap-

witness, although an officer or trustee of the beneficiary organization, has merely a fiduciary and not a personal and pecuniary interest in the benefits to be derived;³⁹ but

pointed by the will a member of an advisory board to administer a certain charity under the will.—In *re Johnson's Estate*, 249 Pa. St. 339, 94 Atl. 1082.

³⁹ In *Jeanes' Estate*, 228 Pa. St. 537, 77 Atl. 824, the court, regarding an attesting witness who was also a stockholder and vice president of the company referred to, says: "Interest which, under the act of 1855, disqualifies a witness from attesting a will containing religious or charitable bequests, must be a present, certain and vested one. . . . The direction of the testatrix upon which the appellant relies, in asking that Balz be declared an interested witness, is merely that his company pay the dividends on the 148 shares of stock under her control at the time she executed her will, to the Women's Hospital, provided it would accept her conditional bequest."

Where a will provided for legacies to four religious, educational, and charitable institutions, and two of the subscribing witnesses were members and trustees of one of the legatees, and the third witness was a trustee of one organization and a director in two of the others, they were nevertheless held to be "credible witnesses."—*Fetterhoff's Estate*, 228 Pa. St. 535, 77 Atl. 826. See, also, *Kess-*

ler's Estate, 221 Pa. St. 314, 128 Am. St. Rep. 741, 15 Ann. Cas. 791, 70 Atl. 770.

"A nominated executor attesting the execution of a will is competent to make the necessary proof to entitle it to be probated. If an executor, as such, is ever disqualified from testifying it is only when ex-officio he is made a party to a proceeding to contest a will." The court then continues and holds that such an executor is not disqualified even then (under the Indiana law) because his relation to the subject matter of the suit is fiduciary and not personal.—*Hiatt v. McColley*, 171 Ind. 91, 85 N. E. 772.

A shareholder in a corporation which is appointed as executor, is competent to act as attesting witness under the Delaware law.—In *re Lecarpentier's Will* (Del. Orph.), 91 Atl. 204.

One who is president of, and a stockholder in, a trust company, which the will appoints trustee to hold property and divide the income between the widow and the daughter of the testator, is competent as an attesting witness to the will.—In *re Wiese's Estate*, 98 Neb. 463, L. R. A. 1915E, 832, 153 N. W. 556.

Salaried employees of a corporation which is made a trustee under the will, may act as attesting wit-

if he has any direct or personal interest in the benefits, he can not be said to be disinterested.⁴⁰

§ 455. Executor as an Attesting Witness: Conflicting Decisions.

The credibility or competency of one named in a will as an executor to be an attesting witness thereto was specially recognized by the statute of 1 Victoria, ch. 26.⁴¹ In the United States the decisions are conflicting. In some cases a person named in a will as executor has been held incompetent as an attesting witness,⁴² and this even

nesses.—In *re Carson's Estate*, 244 Pa. St. 401, 90 Atl. 719.

⁴⁰ One who is designated in the will as a member of an executive committee of a charity created by the will, is not a disinterested witness.—In *re Stinson's Estate*, 228 Pa. St. 475, 139 Am. St. Rep. 1014, 30 L. R. A. (N. S.) 1173, 77 Atl. 807.

Where one of the provisions of a will bequeathed a sum of money to a church, to be applied to the reducing of a mortgage, the guarantor on the mortgage note has such a direct pecuniary interest as to disqualify him as an attesting witness.—*Crowell v. Tuttle*, 218 Mass. 445, 105 N. E. 980.

A stockholder in a corporation, which is a legatee under the will, is disqualified from acting as a witness to the will.—In *re Palethorp's Estate*, 249 Pa. St. 389, 94 Atl. 1060.

A trustee to whom certain legacies are given in trust for friends

of the testatrix, for the education of his children and for designated charities and others which the trustee might choose, is not a disinterested witness and can not act as a subscribing witness.—In *re Arnold's Estate*, 249 Pa. St. 348, 94 Atl. 1076.

⁴¹ Section 17 of Statute of 1 Victoria, ch. 26, is as follows: "That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof."

⁴² *Gilbert v. Gilbert*, 22 Ala. 529, 58 Am. Dec. 268; *Davis v. Rogers*, 1 Houst. (Del.) 44; *Geraghty v. Kilroy* (*Tierney's Estate*), 103 Minn. 286, 114 N. W. 838.

A man nominated as executor by the will, being also a trustee and officer of a church which is a beneficiary of the will, and who has an option on shares of stock which are part of a charitable trust made

though he renounced his executorship.⁴³ The rule, however, has not generally been extended so as to render incompetent as an attesting witness to a will the wife of one who is named therein as executor.⁴⁴ On the other hand, it has been held that although an executor is not a competent witness to the execution of a will in which he is nominated as such, yet the will may be established by his testimony, in which case he forfeits his executor-

by the will, and is one of the trustees, under a voting trust, for voting the stock of a corporation that the testator's business has developed into, and who is entitled to commissions not only as executor but as trustee, is disqualified to subscribe the will as an attesting witness.—*In re Kessler's Estate*, 221 Pa. St. 314, 128 Am. St. Rep. 741, 15 Ann. Cas. 791, 70 Atl. 770.

Under the statute of Illinois an executor has such a direct financial interest in the probate of the will that he is disqualified by reason of such interest, as a witness to the execution of the will. He clearly has an interest in the probate of the will to the extent of his commissions as executor.—*Ferguson v. Hunter*, 7 Ill. (2 Gilman) 657; *Bardell v. Brady*, 172 Ill. 420, 50 N. E. 124; *Sloan v. Sloan*, 184 Ill. 579, 56 N. E. 952; *In re Tobin*, 196 Ill. 484, 63 N. E. 1021; *Godfrey v. Phillips*, 209 Ill. 584, 71 N. E. 19; *Jones v. Abbott*, 235 Ill. 220, 85 N. E. 279; *Jones v.*

Grieser, 238 Ill. 183, 15 Ann. Cas. 787, 87 N. E. 295; *Smith v. Goodell*, 258 Ill. 145, 101 N. E. 255.

⁴³ *Gilbert v. Gilbert*, 22 Ala. 529, 58 Am. Dec. 268.

Contra: *Jones v. Larrabee*, 47 Me. 474.

⁴⁴ *Hawley v. Brown*, 1 Root (Conn.) 494; *Piper v. Moulton*, 72 Me. 155; *Stewart v. Harriman*, 56 N. H. 25, 22 Am. Rep. 408; *Hodgman v. Kittredge*, 67 N. H. 254, 68 Am. St. Rep. 661, 32 Atl. 158; *In re Lyon's Will*, 96 Wis. 339, 65 Am. St. Rep. 52, 71 N. W. 362.

But see *contra*, *Fearn v. Postlethwaite*, 240 Ill. 626, 88 N. E. 1057.

But see *Rowlett v. Moore*, 252 Ill. 436, Ann. Cas. 1912D, 346, 96 N. E. 835, under a later statute.

Under the law of Illinois as it formerly stood, the wife of an executor was not a competent subscribing witness, but this disqualification has now been taken away by an amendment of the statute.—*See Rowlett v. Moore*, 252 Ill. 436, Ann. Cas. 1912D, 346, 96 N. E. 835.

ship and can take no part in the administration of the estate.⁴⁵

§ 456. The Same Subject: Prevailing Rule.

The prevailing rule is that an executor, although he has a right to commissions for administering the estate, has not such an interest, for such reason, as will disqualify him from being an attesting witness.⁴⁶ This rule

⁴⁵ *Jones v. Grieser*, 238 Ill. 183, 15 Ann. Cas. 787, 87 N. E. 295.

⁴⁶ *Comstock v. Hadlyme etc. Soc.*, 8 Conn. 254, 20 Am. Dec. 100; *Meyer v. Fogg*, 7 Fla. 292, 68 Am. Dec. 441; *Baker v. Bancroft*, 79 Ga. 672, 5 S. E. 46; *Davenport v. Davenport*, 116 La. 1009, 114 Am. St. Rep. 575, 41 So. 240; *Sears v. Dillingham*, 12 Mass. 358; *Geraghty v. Kilroy (Tierney's Estate)*, 103 Minn. 286, 114 N. W. 838; *Murphy v. Murphy*, 24 Mo. 526; *Lippincott v. Wikoff*, 54 N. J. Eq. 107, 33 Atl. 305; *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387; *Jordan's Estate*, 161 Pa. St. 393, 29 Atl. 3; *Noble v. Burnett*, 10 Rich. L. (S. C.) 505; *Richardson v. Richardson*, 35 Vt. 238.

"A nominated executor attesting the execution of a will is competent to make the necessary proof to entitle it to be probated. If an executor, as such, is ever disqualified from testifying it is only when ex-officio he is made a party to a proceeding to contest a will." The court goes on to say he is not disqualified even then (under Ind. law), because his relation to the

subject matter of the suit is fiduciary and not personal.—*Hiatt v. McColley*, 171 Ind. 91, 85 N. E. 772.

An executor is not an incompetent attesting witness and does not become so by reason of a suit attacking the probate of the will, in which suit he is a necessary party.—*Wisehart v. Applegate*, 172 Ind. 313, 88 N. E. 501.

"The mere fact that a party is named by a testator in his will as executor clearly does not affect his competency as an attesting witness to the will; for such a witness is competent, if he be one who would at the time be competent to testify in court to the facts which he attests. Tested by this rule, the witness who was named as executor in this case was competent when he attested the will, and, being then competent, no subsequent incompetency, from whatever cause, would prevent the probate of the will."—*Geraghty v. Kilroy (Tierney's Estate)*, 103 Minn. 286, 114 N. W. 838.

Since it is the law in New Hampshire "that the expectation of payment for a service to be performed

has been extended so that a person named as executor is not disqualified as an attesting witness merely because the testator provides in his will that "the rest and remainder of my property" be given to such executor "for his expenses in administering this estate."⁴⁷ And a gift by a will to an executor of a certain amount over and above his commissions, as compensation for services to be rendered in administering the estate, has been held to be the same as commissions, it not being an absolute gift or such a legacy as was intended by the statute to be forfeited if given to a subscribing witness.⁴⁸ A person appointed in a will as attorney of an executor is held to be a competent subscribing witness, since the appointment has no force or effect without the subsequent consent and employment by the executor.⁴⁹ But in Illinois, where the rule prevails that one named as executor is disqualified as a subscribing witness, it was held that a member of a firm of lawyers who had an interest in the fees earned by any member of the firm in any trust relation was disqualified to act as a witness to a will which made the other members of the firm executors and trustees.⁵⁰

§ 457. Creditors as Attesting Witnesses.

Creditors of a testator may be attesting witnesses to the latter's will. The statute of 25 George II, ch. 6, enacted that in case, by will or codicil, any lands, tenements

does not render a witness incompetent, the amount of compensation can not exclude the witness, whatever bearing it may have on his testimony."—*Cochran v. Brown*, 76 N. H. 9, 78 Atl. 1072.

⁴⁷ *Cochran v. Brown*, 76 N. H. 9, 78 Atl. 1072.

⁴⁸ *Pruyn v. Brinkerhoff*, 57 Barb. (N. Y.) 176.

⁴⁹ *In re Rehard's Estate*, 163 Iowa 310, 143 N. W. 1106; *In re Pickett's Will*, 49 Ore. 127, 89 Pac. 377.

⁵⁰ *Smith v. Goodell*, 258 Ill. 145, 101 N. E. 255.

or hereditaments were or should be charged with debt, and any creditor, whose debt should be so charged, had attested or should attest the execution of such will or codicil, such creditor should be admitted as a witness to the execution of the will or codicil, within the intent of the Statute of Frauds.⁵¹ These provisions were substantially in section 16 of the statute of 1 Victoria, ch. 26. Similar acts have been passed in most jurisdictions in the United States.⁵²

§ 458. Gifts to Attesting Witnesses Void: Modifications of the Rule.

The modern rule, generally accepted and established by statute in England⁵³ and in practically all the states of the Union, is that gifts to subscribing witnesses are void. The interest of such a witness is forfeited by statute; he is therefore no longer interested and is a competent witness.⁵⁴ The statutes generally provide two modifications

⁵¹ Referring to the effect of a previous decision where the court would not allow any legatee, nor by consequence a creditor, the legacies and debts being charged on the real estate, to stand as a competent attesting witness, Mr. Justice Blackstone says: "This determination, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will."—2 Bl. Com. *377.

⁵² See synopsis of statutes, Appendix, this volume.

⁵³ Statute of 1 Victoria, ch. 26, § 15.

⁵⁴ *Williams v. Way*, 135 Ga. 103,

68 S. E. 1023; *In re Delavergne's Will*, 259 Ill. 589, 102 N. E. 1081; *Wiley v. Gordon*, 181 Ind. 252, 104 N. E. 500; *Kaufman v. Murray*, 182 Ind. 372, *Ann. Cas.* 1917A, 832, 105 N. E. 466; *Swanzy v. Kolb*, 94 Miss. 10, 136 *Am. St. Rep.* 568, 18 *Ann. Cas.* 1089, 46 So. 549.

As to the Maryland rule, if a witness to a will is also a devisee under it, the fact does not invalidate either the attestation or the devise. This is one effect of the Maryland act of 1798, ch. 100, systematizing the laws as to wills, executors, administrators, etc. See, also, Act of 1864, ch. 109.—*Leitch v. Leitch*, 114 Md. 336, 79 *Atl.* 600.

"A legatee under a will of per-

of the rule, first, if there are a sufficient number of competent witnesses to the will without including the beneficiary, the will is sufficiently witnessed and the devise or bequest stands;⁵⁵ and second, where one of the subscrib-

sonal property is not rendered incompetent by his interest to testify as a witness to prove the factum, or execution, of the will. His interest only goes to the credibility of his evidence—and not to his competence as a witness.”—*State v. Goodman*, 133 Tenn. 375, 181 S. W. 312.

A will must be attested by two witnesses competent at the time to be such, and if a witness has a beneficial interest in the will he can only be considered an attesting witness by virtue of the statute that renders void the devise or bequest made to him by the will.—*Bruce v. Shuler*, 108 Va. 670, 15 Ann. Cas. 887, 35 L. R. A. (N. S.) 686, 62 S. E. 973.

See synopsis of statutes, Appendix, this volume.

⁵⁵ “We held in *Belledin v. Goo-ley*, 157 Ind. 49, that when the wife of one of the two attesting witnesses to a will is the sole beneficiary under said will, the will is void because the husband of such beneficiary is not a competent witness. In this case the wife of the attesting witness Jeffers is not the only beneficiary under said will, but there are nine other beneficiaries.” The court declined to pass upon the competency of Jeffers, he being a supernumerary,

since the law requires only two witnesses and Jeffers was a third.—*Wisehart v. Applegate*, 172 Ind. 313, 88 N. E. 501.

The statute, whereby a bequest to a witness is made void if the will can not be proved without his co-operation, refers to witnesses who sign in attestation, and not to outside witnesses who may be called upon to testify in the probate proceedings.—*Sellards v. Kirby*, 82 Kan. 291, 136 Am. St. Rep. 110, 20 Ann. Cas. 214, 28 L. R. A. (N. S.) 270, 108 Pac. 73.

Massachusetts Rev. Laws, ch. 135, § 5, provides for avoidance of a beneficial devise or bequest to one attesting the will as a subscribing witness, unless there are such witnesses other than he sufficient in number for a valid attestation; in effect this avoids a bequest by codicil to a witness subscribing the latter, of what may remain of money bequeathed by the will after the death of the legatee, unless it be a mere supernumerary witness that is the beneficiary under such codicil.—*Lougee v. Wilkie*, 209 Mass. 184, 95 N. E. 221.

A bequest to a subscribing witness is void unless the will can be proved without resort to such witness.—*Swanzy v. Kolb*, 94 Miss. 10,

ing witnesses is an heir or successor to the estate of a decedent testator, the will is not invalidated for such reason, any devise or bequest to the heir being void, but such heir takes from the estate the inheritance he otherwise would have received, not exceeding, however, the amount given by the will.⁵⁶

§ 459. Husband or Wife of a Beneficiary as an Attesting Witness: Early Rule.

The rule of the common law was that neither a husband nor a wife could be a witness in any case either for or against the other. This rule was not dependent upon interest; it arose from the legal contemplation of the unity of the couple. A husband or wife, therefore, was not a competent attesting witness to the will of the other.⁵⁷

The statute of 25 George II, ch. 6, was held to apply only to those cases where the witness received a direct benefit under the terms of the will, and not to one where a witness would be benefited as a consequence of other conditions. Thus, where the wife of an attesting witness received a beneficial interest under the will, it was held that the husband was not a credible witness since he had an interest at the time of his attestation, and that the statute could not extinguish the interest since it was not his own, but legally his wife's.⁵⁸ Nor did the statute

136 Am. St. Rep. 568, 18 Ann. Cas. 1089, 46 So. 549.

In *re Klein's Estate*, 35 Mont. 185, 88 Pac. 798, the court says: "We decide that Fraser can not take his devise under the will, for the reason that he was a necessary subscribing witness to the same."

⁵⁶ See statutes of the various states.

⁵⁷ *Gump v. Gowans*, 226 Ill. 635, 117 Am. St. Rep. 275, 80 N. E. 1086; *Pease v. Allis*, 110 Mass. 157, 14 Am. Rep. 591.

⁵⁸ *Hatfield v. Thorp*, 5 Barn. & A. 589.

Compare: *Winslow v. Kimball*,

apply to wills of personalty, since such testaments did not require attestation.⁵⁹

§ 460. The Same Subject: Statute of 1 Victoria, Ch. 26.

At common law a wife took a dower interest, and a husband an estate by curtesy, in real property acquired by the other during coverture. To that extent a husband or wife acquired a direct beneficial interest in a devise of real property in favor of the other. The rule in England was that an interest acquired by a husband or wife was not such a direct interest as would come under the statute of 25 George II, ch. 6, and therefore, such interest not being extinguished, a husband or wife was not a competent attesting witness if the will contained a devise or legacy in favor of the other.⁶⁰ That rule has since been modified in England by the statute of 1 Victoria, ch. 26, which enacted that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the husband or wife of such person, or any person claiming under such person or the wife or husband, be utterly null and void, and such

25 Me. 493; *Jackson v. Woods*, 1 Johns. Cas. (N. Y.) 163; *Jackson v. Durland*, 2 Johns. Cas. (N. Y.) 314.

⁵⁹ *Brett v. Brett*, 3 Addams Ecc. 210, 214; *Emanuel v. Constable*, 3 Russ. 436.

Compare: *Lees v. Summersgill*, 17 Ves. Jun. 509.

⁶⁰ *Hatfield v. Thorp*, 5 Barn. & A. 589; *Windham v. Chetwynd*, 1 Burr. 414.

person shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise.

§ 461. The Same Subject: Rule in the United States.

The rule of the old common law as to the husband or wife of a beneficiary under a will not being competent as an attesting witness thereto, has been followed in some jurisdictions in the United States.⁶¹ Practically all the states have statutes rendering devises and bequests to subscribing witnesses void. Under such statutes, although not in terms included, it has been held that the unity of husband and wife is such in legal contemplation that if either be a witness to a will containing a devise or legacy to the other, such devise or legacy is void within the intent of the statute.⁶² Some jurisdictions have covered this particular matter by statute.⁶³ In other states the supposed unity of husband and wife has been severed by legal enactment, or the common law rule abolished.⁶⁴

⁶¹ *Fisher v. Spence*, 150 Ill. 253, 41 Am. St. Rep. 360, 37 N. E. 314; *Chicago Title etc. Co. v. Brown*, 183 Ill. 42, 47 L. R. A. 798, 55 N. E. 632; *Rowlett v. Moore*, 252 Ill. 436, Ann. Cas. 1912D, 346, 96 N. E. 835; *Appeal of Clark*, 114 Me. 105, Ann. Cas. 1917A, 837, 95 Atl. 517; *Sullivan v. Sullivan*, 106 Mass. 474, 475, 8 Am. Rep. 356; *Rucker v. Lambdin*, 12 Smedes & M. (20 Miss.) 230, 257; *Hodgman v. Kittredge*, 67 N. H. 254, 68 Am. St. Rep. 661, 32 Atl. 158; *Giddings v. Turgeon*, 58 Vt. 106, 4 Atl. 711.

⁶² *Winslow v. Kimball*, 25 Me. 493; *Jackson v. Woods*, 1 Johns.

Cas. (N. Y.) 163; *Jackson v. Durland*, 2 Johns. Cas. (N. Y.) 314.

⁶³ See synopsis of statutes, Appendix to this volume.—Connecticut, Genl. Laws, 1902, § 294; Massachusetts, Rev. Laws, ch. 135, § 5; South Carolina, Civ. Code, 1912, § 3567; Virginia, Pollard's Code, 1904, § 2529.

⁶⁴ *White v. Bower*, 56 Colo. 575, Ann. Cas. 1917A, 835, 136 Pac. 1053; *In re Hatfield's Will*, 21 Colo. App. 443, 122 Pac. 63; *Kaufman v. Murray*, 182 Ind. 372, Ann. Cas. 1917A, 832, 105 N. E. 466; *In re Holt's Will*, 56 Minn. 33, 45 Am. St. Rep. 434, 22 L. R. A. 481, 57

But the paramour of a beneficiary is not for that reason rendered incompetent as an attesting witness.⁶⁵

In one case a distinction has been made where the husband or wife takes an interest in personal property only; it being held that such an interest is remote and contingent. Thus the wife, whose husband was a legatee under a decedent's will which she had attested, was held a disinterested and competent witness, she having no present vested interest in the legacy to her husband and it being his own to dispose of at his pleasure.⁶⁶

§ 462. Number of Witnesses Required.

A written will, other than a holographic will, must always be attested and subscribed by the minimum number of witnesses required by the statute, otherwise it is void.⁶⁷ A will or codicil insufficiently attested is not aided by the testimony of other persons not subscribing witnesses, who happen to be present at the time.⁶⁸ A codicil illegally executed because of an insufficient number of attesting witnesses can not be relied upon as a republication of a will so as to make it a part of the will.⁶⁹ But the fact that the number of witnesses that attest

N. W. 219; *Gamble v. Butchee*, 87 Tex. 643, 30 S. W. 861.

"A husband may be a witness to a will in which a legacy creating a separate estate is given to his wife."—*Park's Annot. Civ. Code, Ga.*, 1914, § 3849.

⁶⁵ *In re Klinzner's Will*, 71 Misc. Rep. 620, 130 N. Y. Supp. 1059.

⁶⁶ *Hawkins v. Hawkins*, 54 Iowa 443, 6 N. W. 699.

⁶⁷ *Notes v. Doyle*, 32 App. D. C. 413; *Blackshire Co. v. Northrup*, 176 Ala. 190, 42 L. R. A. (N. S.) 454, 57 So. 743; *Pitts v. Darby*, 182 Ala. 370, 62 So. 523; *Brengle v. Tucker*, 114 Md. 597, 80 Atl. 224; *Morris v. Abney*, 135 La. Ann. 302, 65 So. 315; *Berst v. Moxom*, 163 Mo. App. 123, 145 S. W. 857.

⁶⁸ *Notes v. Doyle*, 32 App. D. C. 413.

⁶⁹ *St. John's Parish v. Bostwick*, 8 App. D. C. 452.

and subscribe to the will exceeds the number required by statute does not affect the validity of the instrument.⁷⁰ This rule obtains even if some of the witnesses did not sign in the presence of the testator,⁷¹ or otherwise failed to comply with the statutory requirements,⁷² if a sufficient number of witnesses duly attested the will and subscribed their names thereto as witnesses. And although one or more witnesses may be interested and therefore incompetent, if the will be properly attested and subscribed by the required number of disinterested and competent witnesses, the legal requirements are fulfilled and the will is valid.⁷³

In some states it is required by statute that the witnesses should sign the will in the presence of one another. Under such a statute, and where three witnesses were required, a will signed at one time by two witnesses only, can not have life imparted to it by a codicil subscribed by two witnesses, one of whom is different from the witnesses to the will itself.⁷⁴ But in jurisdictions where the statute does not require all the witnesses to be present at the same time, evidence of intention that

⁷⁰ Jones v. Brooks, 184 Ala. 115, 63 So. 978; Ducasse's Heirs v. Ducasse, 120 La. 731, 45 So. 565; In re Sizer's Will, 129 App. Div. 7, 113 N. Y. Supp. 210.

"Our conclusion is that it would be an unsafe rule to hold that an undelivered deed, which by chance happened to be attested by two witnesses, could be converted into a will by parol testimony."—Noble v. Fickes, 230 Ill. 594, 12 Ann. Cas. 282, 13 L. R. A. (N. S.) 1203, 82 N. E. 950.

⁷¹ Jones v. Brooks, 184 Ala. 115, 63 So. 978.

⁷² Gore v. Legon, 105 Miss. 652, 63 So. 188.

⁷³ Wisehart v. Applegate, 172 Ind. 313, 88 N. E. 501; In re Carson's Estate, 244 Pa. St. 401, 90 Atl. 719.

⁷⁴ Dunlap v. Dunlap, 4 Desaus. Eq. (S. C.) 305.

Compare: Lea v. Libb, Carth. 35; s. c., 3 Salk. 395.

the attestation of the codicil should apply to the will also is admissible and, if such an intention were established, the number of the witnesses might thus be completed.⁷⁵

§ 463. Holographic Wills: When Witnesses Not Required.

In some jurisdictions, holographic wills are not required to be attested and subscribed by witnesses. A holographic will is one written by the testator by his own hand. The statutes regarding such wills vary greatly and should be consulted in all cases. For instance, in California and Louisiana such a will must be entirely written, dated and signed by the hand of the testator, but no witnesses are required.⁷⁶ In North Carolina⁷⁷ and in Ten-

⁷⁵ *Bond v. Seawell*, 3 Burr. 1775.

⁷⁶ Cal. Civ. Code, § 1277; Louisiana, Civ. Code (Merrick, 1913), art. 1588.

The fact that the word "witness" followed underneath the signature of a testator to his holographic will, did not invalidate the instrument.—*Estate of Soher*, 78 Cal. 477, 21 Pac. 8.

Compare: *Powers v. Davis*, 3 MacArthur (D. C.) 153, 162.

⁷⁷ North Carolina, Pell's Revisal, 1908, § 3113; *Little v. Lockman*, 49 N. C. 494; *Sawyer's Legatees v. Sawyer's Heirs*, 52 N. C. 134; *Hughes v. Smith*, 64 N. C. 493; *Alston v. Davis*, 118 N. C. 202, 24 S. E. 15.

A statute requiring that the holographic will be found "among the valuable papers of the testator" is sufficiently satisfied where the will is found in a locked safe, even

though there were no other paper in the drawer of the safe in which the will was found.—*Harper v. Harper*, 148 N. C. 453, 62 S. E. 553.

Where the law requires that the holographic will be found among the valuable papers and effects of the deceased, it is held that insurance policies are effects within the meaning of the statute.—*In re Jenkin's Will*, 157 N. C. 429, 37 L. R. A. (N. S.) 842, 72 S. E. 1072.

The purpose of the statute requiring a holographic will to be found after death among the valuable papers of the deceased, or deposited with some person for safe-keeping, is to furnish evidence that the deceased attached importance to the paper as a testamentary disposition and to lessen the opportunity for fraud or imposition.—*Emsweller v. Wallace* (W. Va.), 88 S. E. 786.

nessee,⁷⁸ holographic wills, to be valid, must be found among the valuable effects of the testator after his demise or have been deposited with some third person, during the testator's lifetime, for safekeeping. In New York a holographic will must be executed with the same formalities as other written wills, but the rules as to statutory requirements and alterations are less strictly applied.⁷⁹ Other states follow a similar rule,⁸⁰ while in some holographic wills must be executed as fully as any written will.⁸¹

⁷⁸ Tennessee, Thompson-Shannon's Code, 1917, § 3896; Marr v. Marr, 2 Head (39 Tenn.) 303; Tate v. Tate, 11 Humph. (30 Tenn.) 465.

⁷⁹ Matter of Akers' Will, 74 App. Div. 461, 77 N. Y. Supp. 643; Matter of Eakins' Will, 13 Misc. Rep. (N. Y.) 557, 35 N. Y. Supp. 489.

Matter of Beckett, 103 N. Y. 167, 8 N. E. 506; Matter of Turrell, 166 N. Y. 330, 59 N. E. 910.

The holographic will of an illiterate person, with reference to alterations, is viewed in the light of his illiteracy.—In re Wood's Will, 144 App. Div. 259, 129 N. Y. Supp. 5.

A holographic will is valid, if executed according to the laws of the state in which the testator resides, even though executed without such state.—In re Seixas' Will, 73 Misc. Rep. 488, 133 N. Y. Supp. 406.

It is necessary under the laws of some states for a holographic will to be published in the presence of witnesses.—In re Wilmer-

ding's Will, 75 Misc. Rep. 432, 135 N. Y. Supp. 516.

A holographic will is sufficiently attested where signed by the witnesses separately at different times on the same date, both signatures being in the presence of the testator.—In re Levengston's Will, 158 App. Div. 69, 142 N. Y. Supp. 829.

⁸⁰ It is not necessary for the witnesses to a holographic will to see the signature of the testator.—Dougherty's Estate (Dougherty v. Crandall), 168 Mich. 281, Ann. Cas. 1913B, 1300, 38 L. R. A. (N. S.) 161, 134 N. W. 24.

A holographic will is sufficiently signed if the testator writes his signature in the presence of the witnesses in the attestation clause, he intending it to be his signature.—In re Phelan's Estate, 82 N. J. Eq. 316, 87 Atl. 625.

⁸¹ Western Maryland College v. McKinstry, 75 Md. 188, 23 Atl. 471; Neer v. Cowhick, 4 Wyo. 49, 18 L. R. A. 588, 31 Pac. 862.

§ 464. Purpose of Statutes Authorizing Holographic Wills.

The purpose of the statutes authorizing a testamentary disposition of property by holographic will is to enable persons who can not secure the assistance of others in the preparation of a will, or who are not inclined to make known prior to death the disposition which has been made of their properties, to execute a valid paper in their own handwriting, without attestation and subscription by witnesses, and the formalities prescribed by the statutes are intended to effectuate this purpose, not defeat it.⁸² However, the statutes prescribing the method of execution of holographic wills may be said to be mandatory.⁸³ All formalities must be strictly observed. No matter how clearly the last wishes of the decedent may have been expressed, unless the instrument complies with the statutory requirement, it is invalid.⁸⁴

§ 465. Other Instruments Not Written by Testator Can Not Be Incorporated in a Holographic Will.

Since a holographic will must be entirely written by the testator, an extrinsic document can not be incorporated into such a will by reference unless it is wholly in the handwriting of the testator himself. Any other paper incorporated into a will becomes a part thereof,

⁸² Emsweller v. Wallace, (W. Va.) 88 S. E. 786.

⁸³ In re Jenkin's Will, 157 N. C. 429, 37 L. R. A. (N. S.) 842, 72 S. E. 1072.

⁸⁴ Scott v. Harkness, 6 Idaho 736, 59 Pac. 556; Baker v. Brown,

83 Miss. 793, 1 Ann. Cas. 371, 36 So. 539; In re Noyes' Estate, 40 Mont. 190, 20 Ann. Cas. 366, 26 L. R. A. (N. S.) 1145, 105 Pac. 1017, 1020; Warwick v. Warwick, 86 Va. 596, 602, 6 L. R. A. 775, 10 S. E. 843.

and if not written by the testator, the whole will can not be said to be by his hand.⁸⁵

§ 466. Holographic Wills: How and Where Signed.

The name of the testator must be signed by him on some part of the paper. This is for identification of the testator and to furnish evidence that the paper is a completed document.⁸⁶ Written instruments are usually signed at the end thereof, and this would appear to be the logical place for the testator's signature. But if the maker's name appears elsewhere on the paper, at the top, on the margin, or in the body of it, such a signing, from its very nature, would be an equivocal act, and it would be an uncertain indication of the testator's intent to authenticate the instrument unless something appears on the face of the instrument to show it was intended as final.⁸⁷ Other authorities, however, hold that the testator's name appearing anywhere on the paper is sufficient.⁸⁸ A holographic will not signed by the testator, although enclosed in an envelope upon which he had written his signature, was denied probate.⁸⁹ A de-

⁸⁵ *Hewes v. Hewes*, 110 Miss. 826, 71 So. 4; *Gibson v. Gibson*, 28 Gratt. (69 Va.) 44.

See, ante, §§ 65-68, as to other writings incorporated in a will by reference.

⁸⁶ *Emsweller v. Wallace*, (W. Va.) 88 S. E. 786.

⁸⁷ *In re Tyrrell's Estate*, 17 Ariz. 418, 153 Pac. 767, 770; *Succession of Armant*, 43 La. Ann. 310, 26 Am. St. Rep. 183, 9 So. 50; *Ramsey v. Ramsey's Exr.*, 13 Gratt. (Va.) 664, 70 Am. Dec. 438; *Roy v. Roy's Exr.*, 16 Gratt. (Va.) 418, 84 Am. Dec. 696.

⁸⁸ *Estate of Johnson*, Myrick's Prob. (Cal.) 5; *Estate of Barker*, Myrick's Prob. (Cal.) 78; *Estate of Stratton*, 112 Cal. 513, 44 Pac. 1028; *Estate of Camp*, 134 Cal. 233, 66 Pac. 227; *Tate v. Tate*, 11 Humph. (30 Tenn.) 465; *Lawson v. Dawson*, 21 Tex. Civ. App. 361, 53 S. W. 64.

⁸⁹ *In re Poland's Estate*, 137 La. Ann. 219, 68 So. 415.

See, also, *Plumstead's Appeal*, 4 Serg. & R. (Pa.) 545; *Roy v. Roy's Exr.*, 16 Gratt. (Va.) 418, 84 Am. Dec. 696.

cedent wrote at the head of a sheet of note paper: "This is my last and only will. If I should make another later I will destroy this one," not signing her name on the paper but enclosing it in an envelope which she indorsed: "This is my last and only will. To be opened by the officers of the Humane Society at Phoenix." Following this she signed her name, "Miss M. A. R. Tyrrell." There was held to be no sufficient connection between the two papers to incorporate them as one and they were rejected.⁹⁰ This rule is favored, but in another case, upon very similar facts, a signed envelope and unsigned enclosure were admitted.⁹¹

§ 467. The Same Subject: Meaning of "Written by the Hand of the Testator."

A holographic will must be entirely written by the hand of the testator.⁹² Writing, in this sense, does not in-

⁹⁰ Estate of Tyrrell, 17 Ariz. 418, 153 Pac. 767.

See, also, Estate of Rand, 61 Cal. 468, 44 Am. Rep. 555; Estate of Walker, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104; Succession of Armant, 43 La. Ann. 310, 26 Am. St. Rep. 183, 9 So. 50; Baker v. Brown, 83 Miss. 793, 1 Ann. Cas. 371, 36 So. 539; Sears v. Sears, 77 Ohio St. 104, 17 L. R. A. (N. S.) 353, 11 Ann. Cas. 1008, 82 N. E. 1067; Warwick v. Warwick, 86 Va. 596, 6 L. R. A. 775, 10 S. E. 843.

⁹¹ In the Estate of Merryfield, 167 Cal. 729, 141 Pac. 259, the deceased had written the purported will on three sheets of paper which were all of the same size,

character, and apparently torn from the same writing pad. They were found folded together in a locked drawer; the last sheet was in itself a perfect holographic will. It was held, notwithstanding, that all three sheets were entitled to probate as one instrument.

In *Alexander v. Johnston*, 171 N. C. 468, 88 S. E. 785, it was held that where the purported will was unsigned but inclosed in an envelope on which was written "Julia W. Johnston Will" in the handwriting of the deceased, the two documents together were entitled to probate.

⁹² The term "writing," as used with reference to date and as including printed words as well as

clude printing, and if any part of a holographic will is a printed form, the instrument is invalid since not wholly written by the testator.⁹³ This rule applies with equal force where the statute requires the will to be dated in the handwriting of the testator. By date is included the year, month, and date of the month.⁹⁴ The general rule that the provisions of the statute are to be liberally construed has never been stretched to excuse the lack of substantial compliance with the requirement, when demanded by statute, that a holographic will must be dated by the testator.⁹⁵ If the will must be dated by its maker, it is invalid if part of the date is printed.⁹⁶ The date, how-

ordinary writing, does not apply to holographic wills. Writing, in connection with holographic wills, is used in its ordinary sense—to set down legible characters in pen and ink.—*Succession of Robertson*, 49 La. Ann. 868, 62 Am. St. Rep. 672, 21 So. 586.

The paper must be in the handwriting of the deceased. This is to identify the testator, to form the casual connection between the writer and the writing, and to prevent the possibility of change and alterations without the consent of the testator.—*Emsweller v. Wallace*, (W. Va.) 88 S. E. 786.

⁹³ *Estate of Rand*, 61 Cal. 468, 44 Am. Rep. 555; *Estate of Billings*, 64 Cal. 427, 1 Pac. 701; *Maris v. Adams*, (Tex. Civ. App.) 166 S. W. 475.

⁹⁴ *Stead v. Curtis*, 191 Fed. 529, 112 C. C. A. 463; *Estate of Price*, 14 Cal. App. 462, 112 Pac. 482; *Estate of Martin*, 58 Cal. 530, 531;

Estate of Anthony, 21 Cal. App. 157, 131 Pac. 96.

⁹⁵ *Estate of Martin*, 58 Cal. 530, 532; *Estate of Rand*, 61 Cal. 468, 474, 44 Am. Rep. 555; *Estate of Billings*, 64 Cal. 427, 1 Pac. 701; *In re Plumel's Estate*, 151 Cal. 77, 79, 90 Pac. 192, 121 Am. St. Rep. 100; *In re Carpenter's Estate*, 172 Cal. 268, L. R. A. 1916E, 498, 156 Pac. 465.

⁹⁶ *Estate of Billings*, 64 Cal. 427, 1 Pac. 701; *In re Plumel's Estate*, 151 Cal. 77, 121 Am. St. Rep. 100, 90 Pac. 192; *Heffner v. Heffner*, 48 La. Ann. 1088, 20 So. 281; *Succession of Robertson*, 49 La. Ann. 868, 62 Am. St. Rep. 672, 21 So. 586; *In re Noyes' Estate*, 40 Mont. 190, 20 Ann. Cas. 366, 26 L. R. A. (N. S.) 1145, 105 Pac. 1017.

A holographic will was sufficiently dated where the date was given as follows: "4-14-07."—*In re Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130.

ever, does not include the place where the will is executed.⁹⁷ An immaterial portion of a holographic will, such as the place where the will was dated, printed at the head of the paper, has been held not to invalidate the instrument,⁹⁸ likewise one with a printed heading, "My will."⁹⁹

A holographic will which has no other date than "dated this day of, 1906," is invalid under the California statute, there being nothing definite about the date, except the year.—In *re Price's Estate*, 14 Cal. App. 462, 112 Pac. 482.

Where the testator mutilated his holographic will and afterwards undertook to restore it by pasting the pieces together, but left out a

piece containing two figures of the date of the year, the will was void because not dated.—*Succession of Swanson*, 132 La. 606, 61 So. 685.

⁹⁷ *Stead v. Curtis*, 191 Fed. 529, 112 C. C. A. 463.

⁹⁸ *Succession of Robertson*, 49 La. Ann. 868, 62 Am. St. Rep. 672, 21 So. 586.

⁹⁹ *Baker v. Brown*, 83 Miss. 793, 1 Ann. Cas. 371, 36 So. 539.

CHAPTER XVIII.

ACKNOWLEDGMENT OF SIGNATURE AND PUBLICATION OF WILL.

- § 468. Acknowledgment of signature: Rule under the Statute of Frauds.
- § 469. Acknowledgment of signature is expressly mentioned in the statute of 1 Victoria, ch. 26.
- § 470. American statutes regarding acknowledgment of signature by testator.
- § 471. When testator does not sign in presence of witnesses, acknowledgment of signature is necessary.
- § 472. The same subject: Exhibiting signature necessary.
- § 473. The same subject.
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- § 478. Publication not required under the Statute of Frauds.
- § 479. Publication, where required.
- § 480. Proof of publication.
- § 481. What constitutes publication: Surrounding facts and circumstances.
- § 482. The same subject: Acquiescence or approval.
- § 483. The same subject: Reading full attestation clause to witnesses.

§ 468. Acknowledgment of Signature: Rule Under the Statute of Frauds.

The Statute of Frauds, 29 Charles II, ch. 3, required that devises of real property should be signed by the testator or by some other person in his presence and by his

express direction, and should be attested and subscribed in the presence of the testator by three or more credible witnesses. The statute did not, in terms, provide for acknowledgment of his signature by the testator, nor did the statute require the testator to sign in the presence of the witnesses. Under the statute, it became the well settled rule in England that the testator need not sign his will in the presence of the witnesses provided he had previously actually signed the same and then acknowledged his signature to the witnesses.¹

§ 469. Acknowledgment of Signature Is Expressly Mentioned in the Statute of 1 Victoria, Ch. 26.

The statute of 1 Victoria, ch. 26, sec. 9, added a requisite not found in the Statute of Frauds,² that the signature of the testator “shall be *made or acknowledged* by the testator in the presence of two or more witnesses *present at the same time.*”³ The language of the act thus provides for the acknowledgment of the signature and there can be no sufficient acknowledgment unless the signature is exhibited to the witnesses or they are afforded the opportunity of seeing it.⁴ A declaration by

¹ *Stonehouse v. Evelyn*, 3 P. Wms. 253; *Grayson v. Atkinson*, 2 Ves. Sen. 454; *Ellis v. Smith*, 1 Ves. Jun. 12; *Gryle v. Gryle*, 2 Atk. 177.

² *Smith v. Codron*, cited in 2 Ves. Sen. 455; *Ellis v. Smith*, 1 Ves. Jun. 11.

³ *In re Allen*, 2 Curt. 331; *In re Simmonds*, 3 Curt. 79; *Moore v. King*, 3 Curt. 243; s. c., 2 Notes of Cas. 45; s. c., 7 Jur. 205; *Cook v. Parsons*, Prec. ch. 184; *Dormer v.*

Thurland, 2 P. Wms. 506; *Smith v. Smith*, L. R. 1 P. & D. 143.

Compare: *Hindmarsh v. Charlton*, 8 H. L. Cas. 160; s. c., 1 Sw. & Tr. 433.

⁴ *Goods of Swinford*, L. R. 1 P. & D. 631; *Pearson v. Pearson*, L. R. 2 P. & D. 451; *Morritt v. Douglas*, L. R. 3 P. & D. 1; *Shaw v. Neville*, 1 Jur. N. S. 408; *Goods of Gunstan*, L. R. 7 Pro. Div. 102.

See, also, *Hott v. Genge*, 4 Moore P. C. C. 265; s. c., 3 Curt. 160; s. c.,

the testator that the instrument is his will has been held insufficient, the signature of the testator having been hidden from the witnesses.⁵ But where the signature is shown the witnesses, or they are given the opportunity of seeing it, and the witnesses are requested to subscribe as such, it is not required that the testator expressly acknowledge his signature.⁶ A declaration to the witnesses by the testator that the instrument is his last will has been held a sufficient acknowledgment of his signature.⁷

§ 470. American Statutes Regarding Acknowledgment of Signature by Testator.

In the United States the statutes in many jurisdictions regarding signing by the testator and attesting witnesses are based upon the Statute of Frauds, no mention in terms being made of acknowledgment of the signature. In New York, however, the statute reads that "A will must be subscribed by the testator at the end of the will, in the presence of the attesting witnesses, or *acknowledged* by him to have been so made to each of the attesting witnesses."⁸ Similar reference to *acknowledgment*

8 Jur. 323; *Hudson v. Parker*, 1 Rob. Ecc. 14; s. c., 8 Jur. 786; *In re Harrison*, 2 Curt. 863; *Faulds v. Jackson*, 6 Notes of Cas. Supp. 1.

Compare: *Beckett v. Howe*, L. R. 2 P. & D. 1, which was disapproved in *Goods of Gunstan*, L. R. 7 Pro. Div. 102, which last case followed *Hudson v. Parker*, 1 Rob. Ecc. 14. Also compare *Matter of Harrison*, 2 Curt. 863.

⁵ *Goods of Gunstan*, L. R. 7 Pro. Div. 102; *Shaw v. Neville*, 1 Jur. N. S. 408.

⁶ *In re Philpot*, 3 Notes of Cas.

2; *In re Jones*, 1 Deane & Sw. 3; *Gaze v. Gaze*, 3 Curt. 451; *Keigwin v. Keigwin*, 3 Curt. 607; *Goods of Huckvale*, L. R. 1 P. & D. 375, 378; *Inglesant v. Inglesant*, L. R. 3 P. & D. 172; *Goods of Jones*, 1 Jur. N. S. 1096.

Compare: *Morrill v. Douglas*, L. R. 3 P. & D. 1.

⁷ *Gwillim v. Gwillim*, 3 Sw. & Tr. 200; *In re Davis*, 3 Curt. 748; *In re Ashmore*, 3 Curt. 756; *In re Huckvale*, L. R. 1 P. & D. 375.

⁸ *New York Consol. Laws*, 1909, ch. 13, art. 1, § 21.

of his signature by the testator will be found in the statutes of California, New Jersey, and Virginia.⁹ The generally accepted rule in the United States, whether the law be based upon the Statute of Frauds or the statute of 1 Victoria, ch. 26, is that signing by the testator in the presence of the witnesses is unnecessary if he properly acknowledges his signature to them.¹⁰ The difference is in the extent of the acknowledgment, and the statutes in all instances should be referred to.

In New Jersey, prior to 1851, it was necessary that the witnesses should be actually present and see the testator sign the will,¹¹ but by an act of that year it was provided in New Jersey that acknowledgment by the testator that he had executed his will might take the place of signing

⁹ See synopsis of statutes, Appendix, this volume.

¹⁰ *Leverett's Heirs v. Carlisle*, 19 Ala. 80; *Abraham v. Wilkins*, 17 Ark. 292; *Canada's Appeal*, 47 Conn. 450; *Sutton v. Sutton*, 5 Har. (Del.) 459; *Webb v. Fleming*, 30 Ga. 808, 76 Am. Dec. 675; *Denton v. Franklin*, 9 B. Mon. (48 Ky.) 28; *Flood v. Pragoff*, 79 Ky. 607; *Stirling v. Stirling*, 64 Md. 144, 21 Atl. 273; *Cravens v. Faulconer*, 28 Mo. 19; *Welch v. Adams*, 63 N. H. 344, 56 Am. Rep. 521, 1 Atl. 1; *Matter of McElwaine's Will*, 18 N. J. Eq. 499; *In re Coles*, (N. J.) 47 Atl. 385; *Baskin v. Baskin*, 48 Barb. (N. Y.) 200; *Matter of Abercrombie*, 24 App. Div. (N. Y.) 407, 48 N. Y. Supp. 414; *Keyl v. Feuchter*, 56 Ohio St. 424, 47 N. E. 140; *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21.

"The witnesses need not have seen the testator sign the will. It would have been sufficient if all the witnesses, in the presence of each other and in the presence of the testator, signed the will after he had signed it, upon his acknowledgment of having signed it, although they did not see him affix his signature."—*Brown v. McBride*, 129 Ga. 92, 58 S. E. 702.

¹¹ *Mundy v. Mundy*, 2 McCart. (15 N. J. Eq.) 290; *Den ex dem. Mickle v. Matlack*, 17 N. J. Law 86; *Bailey v. Stiles*, 1 Green Ch. (2 N. J. Eq.) 220; *Combs v. Jolly*, 2 Green Ch. (3 N. J. Eq.) 625; *In re McElwaine's Will*, 18 N. J. Eq. 499.

Compare: *Ex parte Henry*, 24 Ala. 638; *Abraham v. Wilkins*, 17 Ark. 292.

in the presence of witnesses. This is now the general rule in America and in England.¹²

§ 471. When Testator Does Not Sign in Presence of Witnesses, Acknowledgment of Signature Is Necessary.

One purpose for which witnesses are required is that of identifying the signature of the testator and, in order to do this, it is necessary that they see him sign his name, or that it be exhibited to them by the testator and that he acknowledge that the same is his signature.¹³

If the testator does not sign in the presence of the witnesses, a failure to acknowledge his signature is fatal to

¹² *Ellis v. Smith*, 1 Ves. Jr. 11; *Webb v. Fleming*, 30 Ga. 808, 76 Am. Dec. 675; *Yoe v. McCord*, 74 Ill. 33; *Crowley v. Crowley*, 80 Ill. 469; *Reed v. Watson*, 27 Ind. 443; *In re Convey's Will*, 52 Iowa 197, 2 N. W. 1084; *Stirling v. Stirling*, 64 Md. 138; 21 Atl. 273; *Small v. Small*, 4 Greenl. (4 Me.) 220, 16 Am. Dec. 253; *Chase v. Kittredge*, 11 Allen (Mass.) 49; 87 Am. Dec. 687; *Osborn v. Cook*, 11 Cush. (Mass.) 532, 59 Am. Dec. 155; *Ela v. Edwards*, 16 Gray (Mass.) 91; *Hall v. Hall*, 17 Pick. (Mass.) 373; *Sechrest v. Edwards*, 4 Metc. (Ky.) 163; *Ray v. Walton*, 2 A. K. Marsh. (9 Ky.) 71; *Dewey v. Dewey*, 1 Metc. (Mass.) 349, 35 Am. Dec. 367; *Cravens v. Faulconer*, 28 Mo. 19; *Jauncey v. Thorne*, 2 Barb. Ch. (N. Y.) 40, 45 Am. Dec. 424; *Lewis v. Lewis*, 11 N. Y. 220; *Hoysradt v. Kingman*, 22 N. Y. 372; *Baskin v. Baskin*, 36 N. Y. 416; *Willis v. Mott*, 36 N. Y. 486;

Sisters of Charity v. Kelly, 67 N. Y. 409; *Eelbeck's Devisees v. Granberry*, 3 N. C. (2 Hayw.) 232; *Reynold's Lessee v. Shirley*, 7 Ohio 39; *Rosser v. Franklin*, 6 Grat. (Va.) 1, 52 Am. Dec. 97; *Parramore v. Taylor*, 11 Grat. (Va.) 220; *Beane v. Yerby*, 12 Grat. (Va.) 239; *Adams v. Field*, 21 Vt. 256; *Roberts v. Welch*, 46 Vt. 164.

¹³ *In re Keeffe's Will*, 155 App. Div. 575, 141 N. Y. Supp. 5; *Matter of Mackay*, 110 N. Y. 611, 6 Am. St. Rep. 409, 1 L. R. A. 491, 18 N. E. 433; *Matter of Laudy*, 148 N. Y. 403, 42 N. E. 1061; *Herring v. Watson*, 182 Ind. 374, 105 N. E. 900; *Nixon v. Snellbaker*, 155 Iowa 390, 136 N. W. 223; *Nunn v. Ehlert*, 218 Mass. 471, L. R. A. 1915B, 87, 106 N. E. 163; *Miller v. Miller*, 96 Miss. 526, 51 So. 210; *Spier v. Spier* (*In re Spier's Estate*), 99 Neb. 853, L. R. A. 1916E, 692, 157 N. W. 1016; *Umstead v. Bowling*, 150 N. C. 507, 64 S. E. 368, 370.

the validity of the will. A formal attestation clause can not afford the presumption of proper attestation when the evidence shows there was none.¹⁴ The testator may either sign his own name or cause it to be signed by some third person at his request without the presence of the witnesses, but in such case the testator must exhibit the signature to the witness and acknowledge it as his signature.¹⁵ If the testator's name is signed by a third person and he adopts and acknowledges it as his signature, it is a valid signing.¹⁶ Where the testator signs by making his mark he must acknowledge it as his signature.¹⁷

§ 472. The Same Subject: Exhibiting Signature Necessary.

Where the language of the statute regarding acknowledgment of his signature by the testator is similar to

¹⁴ *In re Rumsey's Will*, 3 De-marest (N. Y.) 494.

¹⁵ *In re Herring's Will*, 152 N. C. 258, 67 S. E. 570; *Watson v. Hinson*, 162 N. C. 72, Ann. Cas. 1915A, 870, 77 S. E. 1089; *In re Marley's (or Morley) Will*, 140 App. Div. 823, 125 N. Y. Supp. 886.

The witness went into the office where the testator was seated at a desk with the will already signed by him in his hand, the name of the testator being in the plain view of the witness, who was requested to sign his name below that of the other subscribing witness, which he did, after having been told by the other witness out in the shop that the testator desired him to be a witness to his will. This attestation was ap-

proved.—*In re Kessler's Estate*, 221 Pa. St. 314, 128 Am. St. Rep. 741, 15 Ann. Cas. 791, 70 Atl. 770.

¹⁶ *Elston v. Montgomery*, 242 Ill. 348, 26 L. R. A. (N. S.) 420, 90 N. E. 3.

If witnesses, in response to summons as such, are present when the testator makes a futile effort to sign, and see then another person sign for him, their attestation thereupon is good.—*Lindsey v. Stephens*, 229 Mo. 641, 129 S. W. 641.

¹⁷ *In re Rogers' Will*, 52 Misc. Rep. 412, 103 N. Y. Supp. 423.

The name of the testator, in execution of his will, may be written out of the presence of the witnesses if he make his mark in their presence, placing it inside

that of the English statute, the holding of the decisions is likewise similar to the English rule. Under the Statute of Frauds the declaration by the testator that the instrument was his will was held equivalent to an actual signing by the testator in the presence of the witnesses.¹⁸ The New York rule is that the witnesses must, at the time of acknowledgment, see or have the opportunity to see the signature of the testator;¹⁹ and where the paper was not signed in the presence of the witnesses and they could not see whether it had been subscribed by the testator or not, even his declaring "The within to be my act and deed" was held an insufficient acknowledgment.²⁰

the written name.—*Robinson v. Jones*, 105 Md. 62, 65 Atl. 814.

¹⁸ In *White v. Trustees of British Museum*, 6 Bing. 310, 3 Moore & P. 689, wherein, referring to section 5 of the Statute of Frauds, it is said: "It is unnecessary for the testator actually to sign the will in the presence of the three witnesses who subscribe the same and that any acknowledgment before the witnesses that it is his signature, or any declaration before them, that it is his will, is equivalent to an actual signing in their presence, and makes the attestation and subscription complete."

¹⁹ *Chaffee v. Baptist Missionary Convention*, 10 Paige (N. Y.) 85, 40 Am. Dec. 225; *Rutherford v. Rutherford*, 1 Denio (N. Y.) 33, 43 Am. Dec. 644; *Lewis v. Lewis*, 11 N. Y. 220; In re *Mackay's Will*, 110 N. Y. 611, 6 Am. St. Rep. 409, 1 L. R. A. 491, 18 N. E. 433.

Compare: *Dewey v. Dewey*, 1 Metc. (Mass.) 349, 35 Am. Dec. 367; *Ela v. Edwards*, 16 Gray (Mass.) 91, 59 Am. Dec. 155.

²⁰ *Lewis v. Lewis*, 11 N. Y. 220.

To the same effect, see In re *Mackay's Will*, 110 N. Y. 611, 6 Am. St. Rep. 409, 1 L. R. A. 491, 18 N. E. 433. See, also, *Matter of Laudy*, 148 N. Y. 403, 42 N. E. 1061; In re *Dougherty's Estate*, 168 Mich. 281, Ann. Cas. 1913B, 1300, 38 L. R. A. (N. S.) 161, 134 N. W. 24; *Tobin v. Haack* (In re *Ludwig's Estate*), 79 Minn. 101, 81 N. W. 758; *Richardson v. Orth*, 40 Ore. 252, 66 Pac. 925, 69 Pac. 455.

The contrary was held in *Willis v. Mott*, 36 N. Y. 486, but this was overruled in *Re Mackay's Will*, 110 N. Y. 611, 6 Am. St. Rep. 409, 1 L. R. A. 491, 18 N. E. 433, holding that the expressions in the former case to be mere dictum.

"A signature neither seen, identified, nor in any manner referred

Where a testator came into a store where two persons were, and produced a paper, and said: "I have a paper which I want you to sign." One of the persons took the paper, and saw what it was and the signature of the deceased. The testator then said: "This is my will; I want you to witness it." Both the persons thereupon signed the paper as witnesses, under the attestation clause. The deceased then took the paper and said: "I declare this to be my last will and testament," and delivered it to one of the witnesses for safekeeping. At the time when this took place the paper had the name of the testator at the end thereof. It was held that the will was not properly executed for the reason that one of the witnesses did not see the testator's signature, and as to that witness there was not a sufficient acknowledgment or a proper attestation.²¹ But where the signature of the testator is exhibited to the witnesses and they are requested to subscribe their names as such to the instrument which the testator declares to be his last will and testament it is held that the requirements of the statute have been met.²²

to as a separate and distinct thing, can not in any just sense be said to be acknowledged by a reference to the entire instrument by name to which the signature may or may not be at the time subscribed."—Allen, J., in *Lewis v. Lewis*, 11 N. Y. 220.

²¹ *Mitchell v. Mitchell*, 16 Hun (N. Y.) 97; affirmed in 77 N. Y. 596.

²² *Baskin v. Baskin*, 36 N. Y. 416; *Gilbert v. Knox*, 52 N. Y. 125.

Compare: *In re Simmons's Will*, 56 Hun 642, 9 N. Y. Supp. 252.

As to New Jersey rule, see *Ludlow v. Ludlow*, 35 N. J. Eq. 480; *Stewart v. Stewart*, 56 N. J. Eq. 761, 40 Atl. 438.

Where the testator prepared the instrument himself, signed it and then produced it before the witnesses with his signature plainly displayed and asked them to sign, it was held sufficient.—*In re Bassett's Will*, 84 Misc. Rep. 656, 146 N. Y. Supp. 842.

§ 473. The Same Subject.

“If a person’s name appear to an instrument purporting to be his will, and he acknowledge to the witnesses that name to have been subscribed by him, or subscribed for him at his request, or with his consent, and adopted by him as his own act, it is a good subscription of the paper as a will. In the absence of a subscription in presence of the witnesses, there must be substantially such an acknowledgment; and the law will not deem sufficient proof of subscription that which does not come up to this.”²³ For example, an illiterate testator made his mark and had his name written for him by a friend; he then went to two persons and asked them to witness his will, which they did, but without the testator calling their attention to the fact that the subscription of his name had been made by his authority; and the court held that there had been no proper acknowledgment of the signature.²⁴ And if one of the witnesses neither saw the testator subscribe, nor heard him acknowledge the signature, it is fatal to the validity of the will.²⁵

§ 474. What Constitutes Acknowledgment.

Where the statute requires an acknowledgment of the signature only, it need not be expressly made; a mere statement by the testator that the paper is his will, and a request to the witnesses to attest,²⁶ or a direction to

²³ Chaffee v. Baptist Missionary Convention, 10 Paige (N. Y.) 85, 40 Am. Dec. 225; Lewis v. Lewis, 11 N. Y. 220; Sisters of Charity v. Kelly, 67 N. Y. 409.

²⁴ Taney’s Estate, Myrick’s Prob. (Cal.) 210.

²⁵ In re Killick, 3 Sw. & Tr. 578;

Ludlow v. Ludlow, 35 N. J. Eq. 480; Rutherford v. Rutherford, 1 Denio (N. Y.) 33, 43 Am. Dec. 644.

²⁶ In re Huckvale, L. R. 1 P. & D. 375; Beckett v. Howe, L. R. 2 P. & D. 1; Gwillim v. Gwillim, 3 Sw. & Tr. 200; s. c., 29 Law J. Prob. 31; Blake v. Knight, 3 Curt.

the witnesses to put their names under his,²⁷ or simply a request to sign the paper, made either by the testator or by some one in his presence, is a substantial and sufficient compliance with the requirement.²⁸ The acknowledgment by the testator of his signature need not be in exact words, but it must be manifested in some way;²⁹

547; *In re Davis*, 3 Curt. 748; *In re Ashmore*, 3 Curt. 756; s. c., 7 Jur. 1045; *Dewey v. Dewey*, 1 Metc. (Mass.) 349, 35 Am. Dec. 367; *Hogan v. Grosvenor*, 10 Metc. (Mass.) 54, 43 Am. Dec. 414; *Baskin v. Baskin*, 48 Barb. (N. Y.) 200.

Contra: *Taney's Estate*, Myrick's Prob. (Cal.) 210.

"It is not required that the testator should sign his name to the will in the presence of the attesting witnesses. The term 'attested' as used in the statute does not import that it is required that the witnesses should see the very act of signing by the testator. The acknowledgment by the testator that the name signed to the instrument is his, accompanied by a request that the person should attest as a witness, is clearly sufficient. . . . So a declaration by a testator, before the witnesses, that the paper is his will, is sufficient to authorize their attestation, and to make it a good will."—*Dewey v. Dewey*, 1 Metc. (Mass.) 349, 35 Am. Dec. 367.

In Tennessee a man wrote his will and signed it, had a witness sign in attestation without dis-

closing to him the nature of the instrument, and then had another witness sign to whom he declared the nature of the paper, but neither witness saw the other sign. It was held this was sufficient under the Statute of Frauds, which prevails where there is no statute requiring publication.—*Long v. Mickler*, 133 Tenn. 51, 179 S. W. 477.

²⁷ *In re Philpot*, 3 Notes of Cas. 2; *Gaze v. Gaze*, 3 Curt. 451; s. c., 7 Jur. 803.

²⁸ *In re Jones*, 1 Deane & L. 3; 1 Jur. N. S. 1096; *In re Bosanquet*, 2 Rob. Ecc. 577; *Keigwin v. Keigwin*, 3 Curt. 607; s. c., 7 Jur. 840; *Inglesant v. Inglesant*, L. R. 3 P. & D. 172; *Faulds v. Jackson*, 6 Notes of Cas. Supp. 1.

Contra: *Morritt v. Douglas*, L. R. 3 P. & D. 1; *Chaffee v. Baptist Missionary Convention*, 10 Paige (N. Y.) 85, 40 Am. Dec. 225.

²⁹ *Manners v. Manners*, 72 N. J. Eq. 854, 66 Atl. 583; *In re Rogers' Will*, 52 Misc. Rep. 412, 103 N. Y. Supp. 423.

If the witnesses are summoned as such by the testator, and see him attempt to sign and fail in the attempt, and see then another person do so for him, and they then

it may be by his acts or conduct,³⁰ or by a mere nod of the head.³¹ Where the testator showed his will to witnesses, asking them if they recognized his signature and requesting them to sign, it was held a sufficient acknowledgment.³²

§ 475. The Same Subject: Where Will Is Signed for Testator by a Third Person.

Where the will has been signed for the testator by another person in the absence of the attesting witnesses, the acknowledgment need not be in any particular form; it is sufficient if the witnesses are made to understand by signs or attending circumstances that the testator acknowledges the signature as his and the instrument to be his will.³³ And from such acknowledgment it will be presumed that the signature was made by authority of the testator.³⁴ But where one of the witnesses saw the testator's name signed to the will by a third person in the presence and by the direction of the testator, but did not hear him acknowledge it as his will, and the other witnesses, who attested the will the next day, heard the testator say it was his will without expressly acknowledging

sign in attestation, the proof is good.—*Lindsey v. Stephens*, 229 Mo. 600, 129 S. W. 641.

³⁰ *Brown v. McBride*, 129 Ga. 92, 58 S. E. 702; *Umstead v. Bowling*, 150 N. C. 507, 64 S. E. 368; *In re Herring's Will*, 152 N. C. 258, 67 S. E. 570; *In re Kessler's Estate*, 221 Pa. St. 314, 128 Am. St. Rep. 741, 15 Ann. Cas. 791, 70 Atl. 770.

³¹ *Craig v. Trotter*, 252 Ill. 228, 96 N. E. 1003.

³² *Stewart v. Stewart*, (N. J.) 68 Atl. 1116.

³³ *Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579.

Compare: *Taney's Estate*, Myrick's Prob. (Cal.) 210.

³⁴ *Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579.

the signature, it was held that the will was not duly proved so as to devise realty.³⁵

§ 476. "Acknowledgment" and "Publication" Distinguished.

The term "acknowledgment" is generally used with reference to the signature of the testator and must not be confused with "publication" which refers to the will itself. The law of wills requires a signing or subscription by the testator or by some one else at his direction. This may be by mark or otherwise, but in all cases where the witnesses did not see the actual signing the testator must acknowledge his signature and it is the signature which the witnesses attest. The requirement as to attestation and subscription by the witnesses is, among other things, to identify and authenticate the instrument as the one signed by the testator or by another for him. Publication is the declaration by the testator that the instrument is his last will and testament.³⁶ This is required to be done in the presence of each of the witnesses, when demanded at all, in order to prevent imposition upon the testator by procuring him to execute and acknowledge a will or codicil under the pretense that it was a paper of a different nature. The two requirements are distinct in their nature as well as in purpose; and where both are

³⁵ *Burwell v. Corbin*, 1 Rand. (Va.) 131, 10 Am. Dec. 494.

Compare: *In re Baldwin's Will*, 67 Misc. Rep. 329, 124 N. Y. Supp. 612.

³⁶ Publication consists in "the act or acts of the party by which he manifests that it his intention to give effect to the paper as his last will and testament."—*Spier v. Spier* (In re *Spier's Estate*), 99

Neb. 853, L. R. A. 1916E, 692, 157 N. W. 1014. See, also, *In re Ayers' Estate*, 84 Neb. 16, 120 N. W. 491; *In re Clafin's Will*, 73 Vt. 129, 87 Am. St. Rep. 693, 50 Atl. 815; *In re Clafin's Will*, 75 Vt. 19, 58 L. R. A. 261, 52 Atl. 1053.

To the same effect, see *Ripley v. Armstrong*, 159 N. C. 158, 74 S. E. 961.

required the failure to comply with either is fatal to the validity of the instrument.³⁷

§ 477. Time of Publication.

The acknowledgment required by the statute is the recognition before the attestation witnesses by the testator that his will is duly signed, although not signed in their presence. It is this legalized recognition which the witnesses attest by subscribing their names. The paper which the testator acknowledges to the subscribing witnesses must, at the time of such acknowledgment, be a completed or finished will so far as the requirements which the statute imposes upon the testator are concerned. The acknowledgment must be of a finished signature.³⁸ When publication is required, a testamentary document is not complete until the testator has signed or acknowledged his signature, declared the instrument to be his will, and the attesting witnesses have duly subscribed it, but it is wholly immaterial whether the testator make such declaration or publication before, after or contemporaneously with the making or acknowledgment of his signature.³⁹ The publication, however, must

³⁷ *Baskin v. Baskin*, 36 N. Y. 416.

³⁸ *Lane v. Lane*, 125 Ga. 386, 114 Am. St. Rep. 207, 5 Ann. Cas. 462, 54 S. E. 90; *Reed v. Watson*, 27 Ind. 443, 448; *Limbach v. Bolin*, 169 Ky. 204, 183 S. W. 495, 497; *Chase v. Kittredge*, 11 Allen (Mass.) 49, 87 Am. Dec. 687; *Tilden v. Tilden*, 13 Gray (Mass.) 110; *Lewis v. Lewis*, 11 N. Y. 220; *Jauncey v. Thorne*, 2 Barb. Ch. (N. Y.) 40, 45 Am. Dec. 424; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280.

³⁹ *In re Mannion's Estate*, (N. J.) 95 Atl. 988; *Doe v. Roe*, 2 Barb. (N. Y.) 200; *Lewis v. Lewis*, 13 Barb. (N. Y.) 17; *Keeney v. Whitmarsh*, 16 Barb. (N. Y.) 141; *In re Gamber's Will*, 53 Misc. Rep. 168, 104 N. Y. Supp. 476; *In re De Hart's Will*, 67 Misc. Rep. 13, 122 N. Y. Supp. 220; *In re Baldwin's Will*, 67 Misc. Rep. 329, 124 N. Y. Supp. 612; *In re Baumann's Will*, 85 Misc. Rep. 656, 148 N. Y. Supp. 1049; *Jackson v. Jackson*, 39 N. Y. 153.

be to both witnesses, publication to one only being insufficient.⁴⁰

§ 478. Publication Not Required Under the Statute of Frauds.

The Statute of Frauds made no provision for the publication of his will by the testator, nor did it in terms provide for the acknowledgment by him of his signature. As has been before shown, acknowledgment of the signature takes the place of signing. The statute of 1 Victoria, ch. 26, makes provision for the acknowledgment of the testator's signature, but contains no provision as to publication.⁴¹ Acknowledgment refers to the signature only, wherein lies the principal distinction between it and publication, for the testator can acknowledge his signature without the will being read to the witnesses,⁴² without their knowing its contents,⁴³ and even without their being advised that the instrument is in fact a will.⁴⁴

⁴⁰ *Limbach v. Bolin*, 169 Ky. 204, 183 S. W. 495; *In re Williams' Will*, 50 Mont. 142, 145 Pac. 957.

Where the witnesses do not know that the instrument was intended as a will and did not see it signed, there is no publication. —*In re Van Handlyn's Will*, 83 N. J. Eq. 290, 89 Atl. 1010.

⁴¹ Statute of 1 Victoria, ch. 26, § 13, reads: "That every will executed in the manner hereinbefore required shall be valid without any other publication thereof."

⁴² *In re Morgan's Estate*, 219 Pa. 355, 68 Atl. 953; *In re Lillibridge's Estate*, 221 Pa. St. 5, 128 Am. St. Rep. 723, 69 Atl. 1121.

⁴³ *In re Morgan's Estate*, 219 Pa. St. 355, 68 Atl. 953; *Freeman v.*

Freeman, 71 W. Va. 303, 76 S. E. 657.

⁴⁴ *White v. Trustees of British Museum*, 3 Moore & P. 689; s. c., 6 Bing. 310; *Wright v. Wright*, 7 Bing. 457; *Ellis v. Smith*, 1 Ves. Jun. 11; *Keigwin v. Keigwin*, 3 Curt. 607; *Faulds v. Jackson*, 6 Notes of Cas. Supp. 1; *Palmer v. Owen*, 229 Ill. 115, 82 N. E. 275; *Thomson v. Karme*, 268 Ill. 168, 108 N. E. 1001; *Turner v. Cook*, 36 Ind. 129; *Herring v. Watson*, 182 Ind. 374, 105 N. E. 900; *Scott v. Hawk*, 107 Iowa 723, 70 Am. St. Rep. 228, 77 N. W. 467; *Nixon v. Snellbaker*, 155 Iowa, 390, 136 N. W. 223; *Steele v. Marble*, 221 Mass. 485, 109 N. E. 357; *Watson v. Pipes*, 32 Miss. 451; *Combs' Ap-*

§ 479. Publication, Where Required.

There is some confusion as to whether or not, where there is no statute expressly requiring publication, the testator must declare to the witnesses that the instrument is his will.⁴⁵ Some of the decisions, while not expressly declaring publication to be necessary, yet require it to be proven that the testator knew the testamentary character of the instrument.⁴⁶ In other instances, while the formality has not been dispensed with, it has been held unnecessary to prove an actual publication, and that it might be inferred from the circumstances of the case,⁴⁷

peal, 105 Pa. St. 155; *In re Lillibridge's Estate*, 221 Pa. St. 5, 128 Am. St. Rep. 723, 69 Atl. 1121; *Historical Society v. Kelker*, 226 Pa. St. 16, 134 Am. St. Rep. 1010, 74 Atl. 619; *Long v. Mickler*, 133 Tenn. 51, 179 S. W. 478; *In re Clafin's Will*, 75 Vt. 19, 58 L. R. A. 261, 52 Atl. 1053.

Witnesses to a will need not know its contents, need not know the instrument is a will, need not see the testator sign, and need not attest in the presence of each other, provided only that the testator exhibit and acknowledge his signature to them.—*Notes v. Doyle*, 32 App. D. C. 413.

⁴⁵ *Dickie v. Carter*, 42 Ill. 376.

Contra: *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237.

Jarman on Wills (5th Am. Ed. *80) states that although publication was not required by the Statute of Frauds, yet prior to that time it was considered necessary

to complete a testamentary disposition of property. Reference is made to *Ross v. Ewer*, 3 Atk. 156, in which Lord Hardwicke insisted that a devise of a freehold interest in land had to be published in order to be valid. Reference is also made to *Moodie v. Reid*, 7 Taunt. 361, where Gibbs, C. J., held to the contrary, that publication was not a necessary part of a will either at common law, under the statutes of Henry VIII, or under the Statute of Frauds. The latter ruling is generally adopted.

⁴⁶ *Small v. Small*, 4 Greenl. (4 Me.) 220, 16 Am. Dec. 253; *Cilley v. Cilley*, 34 Me. 162; *Worthington v. Klemm*, 144 Mass. 167, 10 N. E. 522; *Dickie v. Carter*, 42 Ill. 376; *Brown v. McAlister*, 34 Ind. 375; *Beane v. Yerby*, 12 Grat. (Va.) 239; *Young v. Barner*, 27 Grat. (Va.) 96.

⁴⁷ *Rogers v. Diamond*, 13 Ark. 474.

from the formal execution of the instrument,⁴⁸ and the writing, signing and attestation.⁴⁹ In Pennsylvania it has been held sufficient for a testator to declare the instrument to be his last act and deed.⁵⁰ In Mississippi, publication is not necessary,⁵¹ nor in Maryland,⁵² Minnesota,⁵³ Iowa,⁵⁴ or Wisconsin.⁵⁵ But the general rule is, that in the absence of an express statutory requirement, publication is not necessary to give validity to a will.⁵⁶

⁴⁸ *Smith v. Dolby*, 4 Har. (Del.) 350.

⁴⁹ *Osborn v. Cook*, 11 Cush. (Mass.) 532, 59 Am. Dec. 155; *Hogan v. Grosvenor*, 10 Metc. (Mass.) 54, 43 Am. Dec. 414; *Tilden v. Tilden*, 13 Gray (Mass.) 110.

Contra: *Ray v. Walton*, 2 A. K. Marsh. (9 Ky.) 71, 74; *Swift v. Wiley*, 1 B. Mon. (40 Ky.) 114, 118; *Flood v. Pragoff*, 79 Ky. 607; *Swett v. Boardman*, 1 Mass. 258, 2 Am. Dec. 16; *Adams v. Field*, 21 Vt. 256; *Dean v. Dean's Heirs*, 27 Vt. 746.

⁵⁰ *Loy v. Kennedy*, 1 Watts. & S. (Pa.) 396; *Miller v. McNeill*, 35 Pa. St. 217, 78 Am. Dec. 333.

⁵¹ *Watson v. Pipes*, 32 Miss. 451.

⁵² *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Etchison v. Etchison*, 53 Md. 348.

⁵³ *In re Allen's Will*, 25 Minn. 39.

⁵⁴ *In re Hulse's Will*, 52 Iowa 662, 3 N. W. 734.

⁵⁵ *Meurer's Will*, 44 Wis. 392, 28 Am. Rep. 591.

Compare: *Webb v. Fleming*, 30 Ga. 808, 76 Am. Dec. 675; *Huff v. Huff*, 41 Ga. 696.

⁵⁶ *Bond v. Seawell*, 3 Burr. 1775; *Moodie v. Reid*, 7 Taunt. 361; *Notes v. Doyle*, 32 App. D. C. 413; *Canada's Appeal*, 47 Conn. 450; *Palmer v. Owen*, 229 Ill. 115, 82 N. E. 275; *Thompson v. Karme*, 268 Ill. 168, 108 N. E. 1001; *Turner v. Cook*, 36 Ind. 129; *Herring v. Watson*, 182 Ind. 374, 105 N. E. 900; *Scott v. Hawk*, 107 Iowa 723, 70 Am. St. Rep. 228, 77 N. W. 467; *Nixon v. Snellbaker*, 155 Iowa 390, 136 N. W. 223; *Ray v. Walton*, 2 A. K. Marsh. (9 Ky.) 71; *Cilley v. Cilley*, 34 Me. 162; *Steele v. Marble*, 221 Mass. 485, 109 N. E. 357; *Watson v. Pipes*, 32 Miss. 451; *In re Lillibridge's Estate*, 221 Pa. St. 5, 128 Am. St. Rep. 723, 69 Atl. 1121; *Historical Society v. Kelker*, 226 Pa. St. 16, 134 Am. St. Rep. 1010, 74 Atl. 619; *Long v. Mickler*, 133 Tenn. 51, 179 S. W. 478; *In re Claffin's Will*, 75 Vt. 19, 58 L. R. A. 261, 52 Atl. 1053; *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21.

§ 480. Proof of Publication.

In those states where publication is required by statute, it is essential that the testator, at the time of subscribing or acknowledging the instrument, declare to the witnesses that it is his last will.⁵⁷ Where acknowledgment, when the signing is not in the presence of the witnesses, and publication are both required by the statute, as in New York, each must be distinctly and separately proved, neither alone being sufficient to establish the other.⁵⁸ Signing in the presence of the witnesses does not stand in lieu of publication, it being required irrespective of the time or manner of signature.⁵⁹ The purpose of the statute in requiring the testator to declare the writing to be his will, is to make sure that he is aware of its nature,

⁵⁷ *In re Walker's Estate*, 110 Cal. 387, 52 Am. St. Rep. 104, 30 L. R. A. 460, 42 Pac. 815; *Estate of Seamen*, 146 Cal. 455, 106 Am. St. Rep. 53, 2 Ann. Cas. 726, 80 Pac. 700; *Reed v. Watson*, 27 Ind. 443; *Tobin v. Haack* (*In re Ludwig's Estate*), 79 Minn. 101, 81 N. W. 758; *In re Noyes' Estate*, 40 Mont. 178, 105 Pac. 1013; *In re Williams' Will*, 50 Mont. 142, 145 Pac. 957; *Bioren v. Nesler*, 77 N. J. Eq. 560, 78 Atl. 201; *Gilbert v. Knox*, 52 N. Y. 125; *Brinckerhoof v. Remsen*, 8 Paige (N. Y.) 488; *In re Foley's Will*, 76 Misc. Rep. 168, 136 N. Y. Supp. 933; *In re Keffe's Will*, 155 App. Div. 575, 141 N. Y. Supp. 5; *In re Shaper's Will*, 86 Misc. Rep. 577, 149 N. Y. Supp. 468; *In re Bryant's Estate*, 148 N. Y. Supp. 917; affirmed, 165 App. Div. 955, 150 N. Y.

Supp. 474; *Tims v. Tims*, 32 Ohio C. C. 506; *Richardson v. Orth*, 40 Ore. 252, 66 Pac. 925, 69 Pac. 455.

⁵⁸ *Baskin v. Baskin*, 48 Barb. (N. Y.) 200; *Lewis v. Lewis*, 11 N. Y. 220, 230; *In re Mackay's Will*, 110 N. Y. 611, 6 Am. St. Rep. 409, 1 L. R. A. 491, 18 N. E. 433.

Where the weight of evidence seemed to show that the testatrix went to one of the witnesses with a paper so folded that he could only see the attestation clause, and asked him if he would witness his signature, it was held insufficient as a publication.—*Porteus v. Holm*, 4 Demarest (N. Y.) 14.

⁵⁹ *In re Fusilier's Estate*, *Myrick's Prob.* (Cal.) 40.

Compare: *Heyer v. Burger*, 1 Hoff. Ch. (N. Y.) 1.

and that he be not imposed on and procured to sign a will when he supposes it to be some other instrument.⁶⁰ The witnesses knowing it to be a will is of no moment, except that their being informed of the nature of the instrument by the testator, or in his presence, makes it certain that he knows its character.⁶¹

§ 481. What Constitutes Publication: Surrounding Facts and Circumstances.

It is not necessary that the testator declare in express terms in the presence of the witnesses that the instrument is his will. It is sufficient if he make known to them by his conduct the fact that he so intends and understands it.⁶² It is not necessary that either of the words "will"

60 *In re Noyes' Estate*, 40 Mont. 178, 105 Pac. 1013; *Auburn Seminary Trustees v. Calhoun*, 25 N. Y. 422; *Gilbert v. Knox*, 52 N. Y. 125.

A witness testified that he had been requested by a third person to act as a witness to Mrs. W.'s will. He accompanied the party to the presence of Mrs. W., who had the paper in her hand. She was sitting at a table where there were pens and ink. She wrote upon the first page of the document, folded the first page back and passed the instrument to one of the witnesses who signed and passed it on, all signing. Nothing was said by Mrs. W. Neither of the words "will" or "testament" was mentioned by her or any one in her presence, nor did she request the witnesses to sign other than by passing the paper and pen. The order admitting the will to probate

was revoked.—*In re Williams' Will*, 50 Mont. 142, 145 Pac. 957.

But compare *Thomas v. English*, 180 Mo. App. 358, 167 S. W. 1147, where a decision to the contrary was rendered upon facts very similar.

Compare, also, *Thompson v. Karme*, 268 Ill. 168, 108 N. E. 1001.

See § 405 as to reasons for statutory formalities.

See § 445 as to purpose of statutes requiring witnesses.

See §§ 489, 490, as to requesting witnesses to sign.

61 *Auburn Seminary Trustees v. Calhoun*, 25 N. Y. 422.

62 *Seguine v. Seguine*, 2 Barb. (N. Y.) 385; *Vaughan v. Burford*, 3 Bradf. (N. Y.) 78; *Gombault v. Public Administrator*, 4 Bradf. (N. Y.) 226; *Von Hoffman v. Ward*, 4 Redf. (N. Y.) 244; *Brinckerhoof v. Remsen*, 8 Paige (N. Y.) 488;

or "testament" should be employed. The declaration by the testator that the instrument contains his last intentions is sufficient.⁶³ Any communication by which the testator indicates to the witnesses that he intends to give effect to the instrument as his will, whether by word, sign, motion or conduct, is sufficient in law to constitute a pub-

Lewis v. Lewis, 11 N. Y. 220; *Robinson v. Smith*, 13 Abb. Pr. (N. Y.) 359; *Darling v. Arthur*, 22 Hun. (N. Y.) 84; *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235; *Lane v. Lane*, 95 N. Y. 494.

In *re Silva's Estate*, 169 Cal. 116, 145 Pac. 1015, the court says: "It is not necessary that the testator should have spoken words declaring the document to be his will, or that he should expressly request the witnesses to sign it as such. It is sufficient if this declaration and request are unmistakably indicated to the persons signing as witnesses by the testator's conduct and actions, although there is no declaration in words to that effect."

Where the testatrix asked a witness, "Will you be a witness to my will?" and the witness signed in response, it was held a good publication.—In *re Balmforth's Will*, 60 Misc. Rep. 492, 113 N. Y. Supp. 934.

The testator some time before having witnessed the will of one of the persons now called as a witness to his own will, said: "I should like you to sign this paper. This is the same kind of a paper

that you asked me to sign for you." Held sufficient.—In *re Marley's (or Morley) Will*, 140 App. Div. 823, 125 N. Y. Supp. 886.

In New York it seems well settled that where a person presents to the required number of other persons a paper previously drawn and subscribed by him personally, with his subscription plainly within their sight, and in substance and effect tells them that the paper is his will and asks them to sign as witnesses thereto, and such persons sign as such witnesses in his presence and in the presence of each other, this amounts to a sufficient publication of the will and an acknowledgment of the signature.—In *re Bassett's Will*, 84 Misc. Rep. 656, 146 N. Y. Supp. 842, citing *Baskin v. Baskin*, 36 N. Y. 416; *Matter of Laudy*, 161 N. Y. 429, 55 N. E. 914; In *re Marley's (or Morley's) Will*, 140 App. Div. 823, 125 N. Y. Supp. 886; *Matter of Akers' Will*, 74 App. Div. 461, 77 N. Y. Supp. 643, affirmed, 173 N. Y. 620, 66 N. E. 1103.

⁶³ *Succession of Morales*, 16 La. Ann. 267; *Buntin v. Johnson*, 28 La. Ann. 796.

lication.⁶⁴ It is sufficient if from the attendant facts and circumstances it satisfactorily appear that all the witnesses knew the document was the will of the testator,⁶⁵ and that the testator understood the nature of the instrument.⁶⁶ A previous request to another to act as a witness to his will may be so connected with its execution as to remedy any apparent defects as to publication at the time the will was signed and witnessed.⁶⁷

⁶⁴ *In re Silva's Estate*, 169 Cal. 116, 145 Pac. 1015; *In re Cullberg's Estate*, 169 Cal. 365, 146 Pac. 888; *In re Ayer's Estate*, 84 Neb. 16, 120 N. W. 491; *Spiers v. Spiers* (*In re Spiers' Estate*), 99 Neb. 853, L. R. A. 1916E, 692, 157 N. W. 1016; *In re De Hart's Will*, 67 Misc. Rep. 13, 122 N. Y. Supp. 220; *In re Marley's (or Morley's) Will*, 140 App. Div. 823, 125 N. Y. Supp. 886; *In re Bassett's Will*, 84 Misc. Rep. 656, 146 N. Y. Supp. 842; *In re Claffin's Will*, 73 Vt. 129, 87 Am. St. Rep. 693, 50 Atl. 815

Where the testator acknowledges and signifies his adoption and approval of a declaration, made in the presence and hearing of the subscribing witnesses, to the effect that the instrument about to be executed was a codicil to his will, it is a sufficient publication.—*In re Gahagan's Estate*, 82 N. J. Eq. 601, 89 Atl. 771.

⁶⁵ *Rogers v. Diamond*, 13 Ark. 474; *Deupree v. Deupree*, 45 Ga. 415; *Grimm v. Tittman*, 113 Mo. 56, 20 S. W. 664; *Estate of Miller*, 37 Mont. 545, 97 Pac. 935; *Ludlow v. Ludlow*, 36 N. J. Eq. 597; *Ayres v. Ayres*, 43 N. J. Eq. 565, 12 Atl.

621; *In re Balmforth's Will*, 133 App. Div. 521, 117 N. Y. Supp. 1065; *In re Hunt's Will*, 110 N. Y. 278, 18 N. E. 106; *Ames v. Ames* (*In re Ames' Will*), 40 Ore. 495, 67 Pac. 737; *Denny v. Pinney's Heirs*, 60 Vt. 524, 12 Atl. 108.

And see: *Hunt v. Mootrie*, 3 Bradf. (N. Y.) 322; s. c., *Moultrie v. Hunt*, 26 Barb. (N. Y.) 252; s. c., reversed in *Moultrie v. Hunt*, 23 N. Y. 394; *Lewis v. Lewis*, 11 N. Y. 220; *Nipper v. Groesbeck*, 22 Barb. (N. Y.) 670.

The witness may infer from any sufficiently suggestive acts on the part of the testator the fact that he means the instrument to be his will.—*In re De Hart's Will*, 67 Misc. Rep. 13, 122 N. Y. Supp. 220; *In re Marley's (or Morley) Will*, 140 App. Div. 823, 125 N. Y. Supp. 886.

If the witnesses did not know that the instrument which they witnessed was intended as a will, there was no publication.—*In re Van Handlyn's Will*, 83 N. J. Eq. 290, 89 Atl. 1010.

⁶⁶ *Auburn Seminary Trustees v. Calhoun*, 25 N. Y. 422.

⁶⁷ *In re De Hart's Will*, 67 Misc.

§ 482. The Same Subject: Acquiescence or Approval.

The publication may be made either wholly by the testator, or by the scrivener, or other agent, asking questions, or the testator expressing his assent by words or signs which plainly indicate his understanding of and acquiescence in the publication;⁶⁸ as where the question was put in writing to a deaf testator and he answered by a nod.⁶⁹ A will may be duly executed and attested, the testamentary character of the instrument may be declared, and the witnesses be asked to sign as such, through the medium of an interpreter translating between the testator and the witnesses.⁷⁰ In another case, after the testator and the witnesses at his request had signed their names, the scrivener asked the testator if the paper was his will, to which he replied "Yes," in the presence of the witnesses, it was held that he had sufficiently de-

Rep. 13, 122 N. Y. Supp. 220, the testatrix 'phoned a man to come to her residence and to bring some one with him, which he did, taking his son. On their arrival the testatrix went to a bureau in the room and brought forth the will, saying she had written it herself and wanted them to sign as witnesses. She made some further remarks about having written it herself. She then signed her name and handed the pen to the elder of the two witnesses, who wrote his name, in turn handing the pen to his son, who did likewise. The court says: "When we consider the conversation the testatrix had with the witnesses at and prior to her signing the will

and the significant fact that after signing the will she handed the pen to one of the witnesses, and he immediately signed the will as a witness and then handed the pen to the other witness, the due publication is established."

⁶⁸ *Tunison v. Tunison*, 4 Bradf. (N. Y.) 138.

⁶⁹ *In re Davis*, 2 Rob. Ecc. 337; *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237; *Van Hooser v. Van Hooser*, 1 Redf. (N. Y.) 365; *Gombault v. Public Administrator*, 4 Bradf. (N. Y.) 226; *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235.

⁷⁰ *Proctor v. Harrison*, 34 Okla. 181, 125 Pac. 489; *Bell v. Davis*, (Okla.) 155 Pac. 1132.

clared to them that it was his will.⁷¹ If the testator is rational, and the will is read to and signed by him in the presence of the witnesses and they, with his intelligent acquiescence, are requested by some other person to attest and subscribe the same, which they do, it is sufficient.⁷² It is often a question as to what constitutes acquiescence or approval by the testator. Where the scrivener made the statement to the witnesses, in the presence of the testator, "This is Mr. ———'s will and he wants you to sign it," it does not constitute a publication unless the

⁷¹ Johnson's Estate, 57 Cal. 529; Harrington v. Stees, 82 Ill. 50, 25 Am. Rep. 290; Reeve v. Crosby, 3 Redf. (N. Y.) 74; Tunison v. Tunison, 4 Bradf. (N. Y.) 138.

Compare: Coffin v. Coffin, 23 N. Y. 9, 80 Am. Dec. 235; Tarrant v. Ware, 25 N. Y. 425, note.

Contra: McCaleb v. Douglass, 16 La. Ann. 327.

The question should be explicit, for the provision that the testator shall declare the instrument to be his will is not complied with by an affirmative reply to a witness, asking if he acknowledge it to be his "work."—Larabee v. Ballard, 1 Demarest (N. Y.) 496.

Where one said to his brother and niece, "I want you to witness my will," and, taking a document from his pocket, signed it; the brother and niece signed under the usual attestation clause; and the testator, replacing the paper in his pocket, carried it away, the court held this to be a sufficient publication.—Darling v. Arthur, 22 Hun (N. Y.) 84. **Compare:** Van Hooser

v. Van Hooser, 1 Redf. (N. Y.) 365. So, also, where a testator after reading the will remarked in the presence of the witnesses, "Evidently I give all I possess to my mother," and the attestation clause which recited that the testator declared to the witnesses that it was his testament was read to and by the testator, and he then requested the witnesses to sign as such, it was a sufficient publication.—Von Hoffman v. Ward, 4 Redf. (N. Y.) 244.

⁷² In re Miller's Estate, 37 Mont. 545, 97 Pac. 935; In re Williams' Will, 50 Mont. 142, 145 Pac. 957; Elkinton v. Brick, 44 N. J. Eq. 154, 1 L. R. A. 161, 15 Atl. 391; In re Beckett, 103 N. Y. 167, 8 N. E. 506.

It is not necessary for a testator to formally declare that the instrument is his will, where it shows on its face its testamentary character and is read in the presence of the witnesses.—Murphy v. Clancy, 177 Mo. App. 429, 163 S. W. 915.

testator thereupon says or does something to confirm the statement.⁷³ Statements are often made in various decisions that the testator must declare or inform the attesting witnesses that the instrument is his will, otherwise the instrument is invalid;⁷⁴ but as before stated, such information need not be by words.⁷⁵ It has been well stated that "the legislature only meant that there should be some communication to the witnesses indicating that the testator intended to give effect to the paper as his will. Any communication of this idea, or to this effect, will meet the object of the statute."⁷⁶ It is not necessary that the testator speak a word.⁷⁷ But the safer rule appears to be that there should be some word or sign

⁷³ *Bioren v. Nesler*, 76 N. J. Eq. 573, 79 Atl. 425.

Compare: *In re Ayers' Estate*, 84 Neb. 16, 120 N. W. 491, where the testator, after the instrument was signed and witnessed, directed the scrivener to put it in an envelope addressed to the county judge, and it was afterwards found in the judge's custody, the publication was held sufficient.

⁷⁴ The testator must inform the attesting witness that the instrument is his will, otherwise the attestation goes for nothing.—*In re Bryant's Estate*, 148 N. Y. Supp. 917; affirmed, 165 App. Div. 955, 150 N. Y. Supp. 474.

⁷⁵ *In re De Hart's Will*, 67 Misc. Rep. 13, 122 N. Y. Supp. 220.

⁷⁶ *Remsen v. Brinckerhoff*, 26 Wend. (N. Y.) 325, 37 Am. Dec. 251, followed in *Re Balmforth's Will*, 133 App. Div. 521, 117 N. Y. Supp. 1065.

⁷⁷ *Thomas v. English*, 180 Mo. App. 358, 167 S. W. 1147.

Compare: *In re Williams' Will*, 50 Mont. 142, 145 Pac. 957.

"The paper contained an attestation clause in the usual form, declaring that the foregoing instrument was, on its date, by — (the testator) signed and sealed and published as, and declared to be her last will and testament." The physician present then read aloud the entire instrument in the presence of the testatrix, one called in as a witness, and the person who had the will prepared. This last mentioned person then indicated to the testator where to sign and she signed accordingly; he then asked the witness and the physician to sign under the attestation clause, which they did. In the language of the court, "During the entire proceeding not a word was spoken" by the testatrix. The ex-

by the testator, or some one acting for him, in his presence and hearing, indicating that the instrument is his will.⁷⁸

§ 483. The Same Subject: Reading Full Attestation Clause to Witnesses.

A statement in the attestation clause that the instrument is a will, if not read to the witnesses, is not a sufficient declaration or publication of the will.⁷⁹ But reading the attestation clause to the witnesses and the testator's assent to the question whether it is his last will, has been held a sufficient publication.⁸⁰ And if the attestation clause is read to the testator in the presence of the witnesses and he sign and request them to sign, it is a suffi-

ecution was held valid. The court further said: "It has been generally held that under statutes like ours, the declarations by the testator that the document is his will, and his request for its attestation, need not be stated in exact terms, but may be implied from his conduct and the attendant circumstances."—*In re Cullberg's Estate*, 169 Cal. 365, 146 Pac. 888.

The testator signed in the presence of the witnesses, then one of the witnesses asked the testator if he wanted him to sign in attestation and the testator bowed his head, whereupon that witness signed and the other witness did likewise. It was held sufficient.—*In re Kindberg's Will*, 141 App. Div. 188, 126 N. Y. Supp. 33.

See, also, *In re Beckett*, 35 Hun (N. Y.) 447.

⁷⁸ *Ludlow v. Ludlow*, 36 N. J. Eq. 597; *Smith v. Smith*, 2 Lans. (N. Y.) 266; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Gilbert v. Knox*, 52 N. Y. 125.

⁷⁹ *Remsen v. Brinckerhoff*, 26 Wend. (N. Y.) 325, 37 Am. Dec. 251.

See, also, *Brinckerhoff v. Remsen*, 8 Paige (N. Y.) 488; *Brown v. De Selding*, 4 Sandf. (N. Y.) 10; *Burritt v. Silliman*, 16 Barb. (N. Y.) 198; *Baskin v. Baskin*, 48 Barb. (N. Y.) 200; *Abbey v. Christy*, 49 Barb. (N. Y.) 276.

⁸⁰ *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Thompson v. Stevens*, 62 N. Y. 634.

Compare: *McCaleb v. Douglass*, 16 La. Ann. 327.

cient publication.⁸¹ And if a paper testamentary in character but not in form be read aloud in the presence of witnesses who are then requested to attest the signature of the maker of the instrument, it is a sufficient publication of the writing as a will.⁸²

⁸¹ In re Wylie's Will, 162 App. Div. 574, 145 N. Y. Supp. 133.

⁸² Carle v. Underhill, 3 Bradf. (N. Y.) 101.

CHAPTER XIX.

ATTESTATION AND SUBSCRIPTION BY WITNESSES.

- § 484. Signing in presence of witnesses: Statute of Frauds.
- § 485. Signing or acknowledging signature before witnesses separately: Early rule.
- § 486. Presence of witnesses with reference to signing, acknowledging, and publishing.
- § 487. The same subject: Illustrations.
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- § 490. What constitutes requesting witnesses to sign.
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- § 499. Witnesses must sign their names *animo testandi*.
- § 500. Witnesses must sign "in the presence of the testator."
- § 501. What constitutes "in the presence of the testator."
- § 502. Witnesses signing in a different room.
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- § 504. Witnesses signing in the presence of each other.
- § 505. The same subject: When demanded by statute.
- § 506. Attestation clause not essential to the validity of the will.

- § 507. Attestation clause is *prima facie* evidence of facts recited therein.
- § 508. Will may be established against testimony of attesting witnesses.
- § 509. Witnesses dead, out of state, or can not remember: Value of attestation clause.
- § 510. The same subject: Although testator signed by mark.
- § 511. Will regular on its face presumed to have been duly executed.
- § 512. The same subject: Conflicting view.
- § 513. Due execution a question of fact.

§ 484. Signing in Presence of Witnesses: Statute of Frauds.

The Statute of Frauds made no provision for the testator signing the will in the presence of witnesses. The requirement was that it should be signed by the testator or by some other person in his presence and by his express direction, with a further requirement that it should be attested and subscribed in the presence of the testator by the witnesses.¹ Soon after the passage of the act the question arose as to whether or not the testator should actually sign, or cause to be signed, his will in the presence of the witnesses; and it became the settled rule in England that the statute did not require the witnesses to actually see the writing of the signature by the testator or by some one else at his express direction, but that it was sufficient if the will theretofore had been duly

¹ Statute of 29 Charles II, ch. 3, § 5 (Statute of Frauds), as to devises of lands and tenements, provided that they should be executed as follows: "Shall be in writing, signed by the party so devising the same, or by some

other person in his presence and by his express direction, and shall be attested and subscribed in the presence of said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

signed prior to the acknowledgment and publication of the will in the presence of each or all of the witnesses.²

§ 485. Signing or Acknowledging Signature Before Witnesses Separately: Early Rule.

The signing or subscription of the testator's name by some third person at his request or the acknowledgment of the signature by the testator must be in the presence of the witnesses; for instance, it is not sufficient for the testator merely to show and acknowledge his signature to one of the witnesses, the signing not having been in the presence of the witnesses.³ The question arose whether one act, such as the signing, could take place in the presence of one witness, and thereafter the signature be acknowledged to the other witnesses. It was early determined in England, under the Statute of Frauds, that a will of real estate attested by three witnesses who had at

² *Lemayne v. Stanley*, 3 Levinz 1; *Anon.*, Skin. 227; *Stonehouse v. Evelyn*, 3 P. Wms. 253; *Gryle v. Gryle*, 2 Atk. 177; *Ellis v. Smith*, 1 Ves. Jun. 12; *White v. Trustees of British Museum*, 6 Bing. 310, 3 Moore & P. 689; *Westbeeck v. Kennedy*, 1 Ves. & Bea. 363.

"If it was in the case of a note, or declaration of trust, or any other instrument not requiring the solemnities of a deed, but bare signing, if that instrument is attested by witnesses, proving they were called in, and that he took that instrument, and said, that was his hand, that would be sufficient attestation of signing by him. That is a rule of evidence; considering therefore the words of

the act of parliament (Statute of Frauds) it seems upon the penning of that clause, that if the testator having signed the will, did before those witnesses declare and acknowledge he had done so, and that that was his hand, that might be sufficient within that clause; for as to the subscribing that makes no difference in the case; that further circumstance is required by the statute to make it necessary that they should certify their attestation all of them in the presence of the testator; therefore is subscription mentioned."—*Grayson v. Atkinson*, 2 Ves. Sen. 454.

³ *In re Keeffe's Will*, 155 App. Div. 575, 141 N. Y. Supp. 5.

separate times subscribed their names in the presence of the testator and at his request was valid, although the witnesses were never present at the same time.⁴ It is doubtful whether such was in conformity with the intention of the framers of the provisions of the Statute of Frauds relative to the execution of wills of real estate, but such rule is in conformity with the letter of the statute which only required that wills should be signed by the testator, but not that such signing should take place in the presence of the attesting witnesses. Nor did the statute, in terms, require the witnesses to attest the will at the same time and in the presence of each other, but only that the will should be attested by three or more credible witnesses who should subscribe the same in the presence of the testator.⁵

§ 486. Presence of Witnesses With Reference to Signing, Acknowledging, and Publishing.

The actual signing, as has been shown, need not be in the presence of the witnesses if the signature be duly acknowledged by the testator.⁶ The "presence of the witnesses" has reference alike to signing by the testator, by some one else at his request, or to acknowledgment of his signature by the testator.⁷ Publication, however, stands by itself, and, when required by statute, must be made

⁴ Anon., 2 Chan. Cas. 109; Cook v. Parsons, Prec. in Ch. 184.

⁵ Grayson v. Atkinson, 2 Ves. Sen. 454; Gryle v. Gryle, 2 Atk. 176; Jauncey v. Thorne, 2 Barb. Ch. (N. Y.) 40, 45 Am. Dec. 424.

⁶ See ch. 18.

⁷ Herring v. Watson, 181 Ind. 374, 105 N. E. 900; In re Keefe's

Will, 155 App. Div. 575, 141 N. Y. Supp. 5; In re Roe's Will, 82 Misc. Rep. 565, 143 N. Y. Supp. 999; In re Nussbaum's Estate, 144 N. Y. Supp. 443; Table Rock Lumber Co. v. Branch, 158 N. C. 251, 73 S. E. 164; Watson v. Hinson, 162 N. C. 72, Ann. Cas. 1915A, 931, 77 S. E. 1089.

to all the witnesses. Signing or acknowledgment to one witness does not aid publication to the others, there being no publication to all.⁸

§ 487. The Same Subject: Illustrations.

Where the statute requires that the testator either sign or acknowledge the signature, signed by him or by some one at his request, in the presence of the attesting witnesses, and the testator sign his will in the presence of one witness, later acknowledging his signature to a second, and still later to a third witness, the signing and acknowledgment of the signature are sufficient to satisfy the statutory requirements as to signing and acknowledgment.⁹ It has been held that although the testator may not have signed in the presence of all the witnesses at once, and the witnesses did not, in fact, write their names at one time, yet if the testator acknowledged his signature and declared it to be his will to all of them at once, and those who had before written their names as witnesses then reaffirmed their signatures, it was an effective execution and attestation.¹⁰ Where one of the witnesses was behind the testator, assisting in holding him up, and did not see him make his mark, but was in a position where he might have seen, it was decided that his attestation was not thereby invalidated.¹¹ In New York, where

⁸ Seymour v. Van Wyck, 6 N. Y. 120.

Compare: Barry v. Brown, 2 Demarest (N. Y.) 309; Seguire v. Seguire, 2 Barb. (N. Y.) 385; Robinson v. Smith, 13 Abb. Pr. (N. Y.) 359.

⁹ Webb v. Fleming, 30 Ga. 808, 76 Am. Dec. 675; Grubbs v. Mar-

shall, 11 Ky. Law Rep. 870, 13 S. W. 447; Hoysradt v. Kingman, 22 N. Y. 372; Matter of Potter's Will, 12 N. Y. Supp. 105, 33 N. Y. St. Rep. 936.

¹⁰ Moale v. Cutting, 59 Md. 510.

¹¹ Etchison v. Etchison, 53 Md.

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the statute requires the testator to subscribe his will "in the presence of each of the attesting witnesses," each witness must see the testator sign, or must during the act of signing, have his attention directed to it.¹² So in England it was held that as the witnesses had seen the testatrix write what the court presumed to be her signature, it was sufficient, although they did not see the name and she did not acknowledge it as her signature.¹³

§ 488. Witnesses "Present at the Same Time."

The statute of 1 Victoria, ch. 26, sec. 9, added a requirement not found in the Statute of Frauds,¹⁴ that signing or acknowledgment of the signature by the testator should be in the presence of two or more witnesses "present at the same time."¹⁵ This provision is found in the statutes of some of the states.¹⁶ Under the statute of Virginia, which contains the same provision, the testator signing and acknowledging his signature in the presence of one witness and subsequently acknowledging his signature to the other witness, the first witness being present, was held sufficient. The court said in substance that two witnesses may be in the presence of the testator, yet not in the presence of each other, and that to demand both circumstances would impose a double duty on the court

¹² In *re Gardiner's Will*, 3 De-marest (N. Y.) 98.

¹³ *Smith v. Smith*, L. R. 1 P. & D. 143.

¹⁴ *Smith v. Codron*, cited in 2 Ves. Sen. 455; *Ellis v. Smith*, 1 Ves. Jun. 11.

¹⁵ In *re Allen*, 2 Curt. 331; In *re Simmonds*, 3 Curt. 70; *Moore v. King*, 3 Curt. 243; s. c., 2 Notes

of Cas. 45; s. c., 7 Jur. 205; *Cook v. Parsons*, Prec. Ch. 184; *Dormer v. Thurland*, 2 P. Wms. 506; *Smith v. Smith*, L. R. 1 P. & D. 143.

Compare: *Hindmarsh v. Charlton*, 8 H. L. Cas. 160; s. c., 1 Sw. & Tr. 433.

¹⁶ See synopsis of statutes, Appendix, this volume.

of deciding double relations, would complicate proofs, and would endanger the testator's intentions.¹⁷

§ 489. Requesting Witnesses to Sign as Such: Statutory Regulations.

The Statute of Frauds (29 Charles II, ch. 3) and the Statute of Wills (1 Victoria, ch. 26) provide only that the will be attested and subscribed by witnesses, and contain no requirement that the testator must request the witnesses to sign as such. This formality is likewise omitted from the statutes of some of the states in the Union.¹⁸ In others it is required that the witnesses must sign as such at the request of the testator. Where the statute contains such a provision the will is invalid unless there be such request.¹⁹ The request to the witnesses to sign as such may be made before the actual signature of the testator, or afterward; but it must be all part of the same transaction.²⁰

¹⁷ *Green v. Crain*, 12 Grat. (Va.) 252. See, also, *Parramore v. Taylor*, 11 Grat. (Va.) 220; *Beane v. Yerby*, 12 Grat. (Va.) 239.

Compare: *In re Emart's Estate*, (Cal.) 165 Pac. 707.

¹⁸ Under the Colorado statute it is not required that the witnesses be requested by the testator to act as such.—*In re Burnham's Will*, 24 Colo. App. 131, 134 Pac. 254.

Under the Massachusetts law it is sufficient if the testator subscribes in the presence of the witnesses, without any formal request that they act as such, or

any publication of the will as such.—*Steele v. Marble*, 221 Mass. 485, 109 N. E. 357.

See, also, *Thompson v. Thompson*, 49 Neb. 157, 68 N. W. 372; *In re Meuer*, 44 Wis. 392, 28 Am. Rep. 591.

See synopsis of statutes, Appendix, this volume.

¹⁹ *Brengle v. Tucker*, 114 Md. 597, 80 Atl. 224; *Avaro v. Avaro*, 235 Mo. 424, 138 S. W. 500; *In re Benjamin's Will*, 136 N. Y. Supp. 1070; *In re Roe's Will*, 82 Misc. Rep. 565, 143 N. Y. Supp. 999.

²⁰ *In re Gamber's Will*, 53 Misc. Rep. 168, 104 N. Y. Supp. 476.

§ 490. What Constitutes Requesting Witnesses to Sign.

Where the statute requires that the testator request the witnesses to subscribe his will as such, it is not necessary that such request be formally expressed in words.²¹ Any act or sign will be sufficient,²² and it may be made either by the testator himself or by some one acting for him in his presence and hearing.²³ The request may likewise be

21 In re Johnson's Estate, 152 Cal. 778, 93 Pac. 1015; In re Silva's Estate, 169 Cal. 116, 145 Pac. 1015; Craig v. Trotter, 252 Ill. 228, 96 N. E. 1003; Brengle v. Tucker, 114 Md. 597, 80 Atl. 224; Conrades v. Heller, 119 Md. 448, 87 Atl. 28; Steele v. Marble, 221 Mass. 485, 109 N. E. 357; Avaro v. Avaro, 235 Mo. 424, 138 S. W. 500; Murphy v. Clancy, 177 Mo. App. 429, 163 S. W. 915; Thomas v. English, 180 Mo. App. 358, 167 S. W. 1147; In re Miller's Estate, 37 Mont. 545, 97 Pac. 935; In re Marley's (or Morley) Will, 140 App. Div. 823, 125 N. Y. Supp. 886; In re Cherry's Will, 164 N. C. 363, 79 S. E. 288; In re Lillibridge's Estate, 221 Pa. St. 5, 128 Am. St. Rep. 723, 69 Atl. 1121.

"The statute requires that the testator shall request the subscribing witnesses to attest his will; but it is not necessary that he should in terms ask them to sign, as other facts may constitute a legal request."—Brengle v. Tucker, 114 Md. 597, 80 Atl. 224.

22 In re Davies, 2 Rob. Ecc. 337; Rogers v. Diamond, 13 Ark. 474;

Crittenden's Estate, Myrick's Prob. (Cal.) 50; Allison v. Allison, 46 Ill. 61, 92 Am. Dec. 237; Craig v. Trotter, 252 Ill. 228, 96 N. E. 1003; Higgins v. Carlton, 28 Md. 115, 117, 92 Am. Dec. 666; Conrades v. Heller, 119 Md. 448, 87 Atl. 28; In re Allen's Will, 25 Minn. 39; Odenwaelder v. Schorr, 8 Mo. App. 458; Thomas v. English, 180 Mo. App. 358, 167 S. W. 1147; Avaro v. Avaro, 235 Mo. 424, 138 S. W. 500; Brown v. De Selding, 4 Sand. (N. Y.) 10; Segune v. Segune, 2 Barb. (N. Y.) 385; Doe v. Roe, 2 Barb. (N. Y.) 200; Nelson v. McGiffert, 3 Barb. Ch. (N. Y.) 158, 49 Am. Dec. 170; Hutchings v. Cochrane, 2 Bradf. (N. Y.) 295; Coffin v. Coffin, 23 N. Y. 9, 80 Am. Dec. 235; In re Cherry's Will, 164 N. C. 363, 79 S. E. 288.

23 Inglesant v. Inglesant, L. R. 3 P. & D. 172; Bundy v. McKnight, 48 Ind. 502; Dyer v. Dyer, 87 Ind. 13; Etchison v. Etchison, 53 Md. 348; Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220; Gilbert v. Knox, 52 N. Y. 125; Brown v. Clark, 77 N. Y. 369; In re Herring's Will, 152 N. C. 258, 67 S. E. 570; Cheatham v. Hatcher, 30 Grat. (Va.) 56,

implied from the surrounding facts and circumstances.²⁴ Where witnesses, in the presence of the testator, are requested to act as such by a third person, it is a sufficient acquiescence on the part of the testator if he is able to object and does not.²⁵ Any word or act which makes it certain that the instrument is a will and that the testator desires the witnesses to sign it as such, is sufficient.²⁶ Where the request to the witnesses to sign is made by some one other than the testator, it must clearly appear that it was done in accord with the testator's desire, and not secretly and fraudulently.²⁷

§ 491. When Witnesses Are Summoned by an Interested Party.

A legatee under the will may summon the witnesses, provided the testator in some way requests them, when they appear, to act and sign as such.²⁸ Should the summons be by one charged with unduly influencing the tes-

32 Am. Rep. 650; Meurer's Will,
44 Wis. 392, 28 Am. Rep. 591.

24 Freeman v. Freeman, 71
W. Va. 303, 76 S. E. 657.

Where a testator sends for persons to witness his will, and, on these persons entering the rooms, shakes the hand of one and remarks that he had witnessed his first will and he would have to call on him again, it was held to amount to a request.—Lindsey v. Stephens, 229 Mo. 600, 129 S. W. 665.

25 In re Silva's Estate, 169 Cal. 116, 145 Pac. 1015.

26 Conrades v. Heller, 119 Md. 448, 87 Atl. 28; In re Cherry's Will, 164 N. C. 363, 79 S. E. 288.

27 Heath v. Cole, 15 Hun (N. Y.) 100.

A subscribing witness testified that the appellee said to his brother (testator), "I brought Mr. Menne and Bobbie here to witness your will," and that the testator said "All right." It was held error to refuse, on cross-examination, an impeaching question as to the witness having, in a conversation, stated that the testator did not assent by word or motion to the proposition as to these persons signing in attestation.—Craig v. Trotter, 252 Ill. 228, 96 N. E. 1003.

28 In re Hermann's Will, 87 Misc. Rep. 476, 150 N. Y. Supp. 118.

tator in the making of his will, although that fact is in itself a significant circumstance in connection with the question of undue influence, the will is not thereby invalidated if the testator ultimately requests the witnesses to sign their names as such at the end of the will.²⁹ The request to sign need not be made to both witnesses; to one in the presence of the other is sufficient.³⁰ The omission to state in the attestation clause that the testator requested the witnesses to sign as such is immaterial.³¹

§ 492. Witnesses Signing or Subscribing Their Names: Signing Wrong Name.

In England and in practically all of the states of the United States, attesting witnesses to a will must sign or subscribe their names to the instrument. In Pennsylvania the requirement is that a will generally must be *proved* by the oath or affirmation of two or more competent witnesses, but where a devise or bequest is made to charity, the will must be *attested* by two credible and disinterested persons.³² The requirement as to signing or subscribing by the witnesses is liberally construed, and whatever may be written by a witness as representing his name and for the purpose of his identification will be accepted by the court as equivalent to his signature. A description of himself written by a witness has been considered a compliance with the law.³³ It will not invalidate a will for a wit-

²⁹ In re Hermann's Will, 87 Misc. Rep. 476, 150 N. Y. Supp. 118.

³⁰ Coffin v. Coffin, 23 N. Y. 9, 80 Am. Dec. 235.

A request to sign as a witness, made on the day prior to the execution of the will, has been held

valid. — Brady v. McCrosson, 5 Redf. (N. Y.) 431.

³¹ Crittenden's Estate, Myrick's Prob. (Cal.) 50.

³² Pennsylvania Laws, Purdon's Digest, 13th ed., §§ 5120, 5129.

³³ Goods of Sperling, 33 L. J. Prob. 25; s. c., 3 Sw. & Tr. 272,

ness to write a name other than his own, provided he intended it to represent his name.³⁴ But there must be no intention to cause it to appear that another had attested the instrument, else it is void; as where one of the witnesses subscribed the name of his father, it was held not a proper attestation. When the wrong name is not signed by mistake, one name can not be taken as a substitute for another.³⁵

§ 493. Desirable That Witnesses Can Write Their Own Signatures, Also to Insert Residences.

It is desirable that in the selection of witnesses to a will only those should be chosen who can write their signatures with their own hands. It is, however, merely a matter of convenience in order to more easily identify the witnesses, especially in the case of the death of one or more of them, but it is not an essential requirement to the act of execution.³⁶ The residences of the witnesses should be written after their signatures for the purpose of identification, but this is not necessary unless required by statute.³⁷

where the words written were "servant of Mr. Sperling."

³⁴ In re Olliver, 2 Spinks 57; In re Ashmore, 3 Curt. 756; Harrison v. Elvin, 3 Q. B. 117; Baker v. Denning, 8 Adol. & E. 94; Wigan v. Rowland, 11 Hare 157, 21 Eng. L. & Eq. 132; Doe v. Davis, 11 Jur. 182.

A will should not be denied probate because an attesting witness has, by mistake merely, signed the testator's name instead of his own.—In re Jacobs' Will, 73 Misc. Rep. 162, 132 N. Y. Supp. 481.

³⁵ Ex parte Leroy, 3 Bradf. (N. Y.) 227.

See, also, In re Leverington, 11 Prob. Div. 80; s. c., 55 Law J. Prob. 62; Pryor v. Pryor, 29 L. J. Prob. 114.

³⁶ In re Pope, 139 N. C. 484, 111 Am. St. Rep. 813, 4 Ann. Cas. 635, 7 L. R. A. (N. S.) 1193, 52 S. E. 235.

³⁷ In re Sandmann's Will, (N. J.) 68 Atl. 754.

The statute of New York, Consol. Laws, 1909, ch. 18, art. 1, § 22, requires witnesses to write their

§ 494. Witness Signing by Mark, or Initials.

Under the Statute of Frauds, the attesting and signing by witnesses was held valid where only one witness subscribed his name, the other two merely making their marks,³⁸ and it is now the well established rule that a witness may make his signature by mark.³⁹ Proof, however, of it being the mark of the witness is required.⁴⁰ So the initials of the witnesses may take the place of their full names, and if put in the usual place of the attesting signatures will be taken as a valid signing of the will;⁴¹ but initials written in the margin, apparently for the purpose of identifying alterations, can not be accepted as an

respective places of residence opposite their names.

Montana Revised Codes, 1907, § 4728, states a witness must write his name and place of residence, but a violation of the section does not impair the validity of the will.

California Civ. Code, § 1278, has the same provision as Montana.

³⁸ *Harrison v. Harrison*, 8 Ves. Jun. 185.

³⁹ *Warren v. Postlethwaite*, 9 Jur. 721; *White v. British Museum Trustees*, 6 Bing. 310; *Wright v. Wright*, 7 Bing. 457; *In re Maddock*, L. R. 3 P. & D. 169; *In re Ashmore*, 3 Curt. 756; *In re Amiss*, 2 Rob. Ecc. 116; s. c., 7 Notes of Cas. 274; *Harrison v. Harrison*, 8 Ves. Jun. 185; *Addy v. Grix*, 8 Ves. Jun. 504; *Doe ex dem. Davies v. Davies*, 9 Q. B. 648; *Small v. Small*, 4 Greenl. (4 Me.) 220, 16 Am. Dec. 253; *Osborn v. Cook*, 11 Cush. (Mass.) 532,

59 Am. Dec. 155; *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565; *Den v. Mitton*, 12 N. J. Law (7 Halst.) 70; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; *Pridgen v. Pridgen's Heirs*, 35 N. C. 259; *Adams v. Chaplin*, 1 Hill's Eq. (S. C.) 265, 266; *Pridgen v. Pridgen's Heirs*, 35 N. C. 259; *Devereaux v. McMahon*, 108 N. C. 134, 12 L. R. A. 205, 12 S. E. 902; *In re Pope*, 139 N. C. 484, 111 Am. St. Rep. 813, 4 Ann. Cas. 635, 7 L. R. A. (N. S.) 1193, 52 S. E. 235.

The certificate of acknowledgment of a notary public affixed to a will and signed by him, is a sufficient signature by him as an attesting witness.—*Bolton v. Bolton*, 107 Miss. 84, 64 So. 967.

⁴⁰ *Collins v. Nicols*, 1 Har. & J. (Md.) 399.

⁴¹ *In re Christian*, 2 Rob. Ecc. 110; s. c., 7 Notes of Cas. 265.

attestation of the instrument itself,⁴² unless this apparent purpose be disproved by evidence from without, which in such case would be admissible.⁴³ In a California case, however, where a witness signed his name "Wm. H.," and for some reason did not sign his last name, though the paper was scratched as though he had attempted to do so, the attestation was held insufficient, the court saying: "No person can tell from an examination of the paper whether the name of the witness was William H. Ford, or William H. Smith, or William H. anything."⁴⁴ Whatever is written must be for the purpose of identifying the witness,⁴⁵ and it must be with the intention that it stand for his signature.⁴⁶ Sealing, however, does not stand for signing.⁴⁷

§ 495. Name of Witness Written by Another: Conflict of Authority.

We have already seen that a witness may sign by making his mark. It is also the generally accepted rule that a witness may effectually sign or subscribe his name in attestation of a will if he holds the pen while his signature is being written.⁴⁸ There is a conflict of authority, however, as to whether or not the name of a witness may

⁴² *In re Cunningham*, 4 Sw. & Tr. 192; s. c., 29 L. J. Ch. 71; *In re Martin*, 6 Notes of Cas. 694; s. c., 1 Rob. Ecc. 712.

⁴³ *Dunn v. Dunn*, L. R. 1 P. & D. 277.

⁴⁴ *Winslow's Estate*, Myrick's Prob. (Cal.) 124.

⁴⁵ *In re Eynon*, L. R. 3 P. & D. 93; *In re Maddock*, L. R. 3 P. & D. 169.

⁴⁶ *In re Maddock*, L. R. 3 P.

& D. 169; *In re Duggins*, 39 L. J. Prob. 24; *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565.

⁴⁷ *In re Byrd*, 3 Curt. 117; s. c., 1 Notes of Cas. 490.

⁴⁸ *Bell v. Hughes*, 5 L. R. Ir. 407; *In re Lewis*, 31 L. J. Prob. 153, 7 Jur. N. S. 688; *In re Frith*, 1 Sw. & Tr. 8; s. c., 27 L. J. Prob. 6; s. c., 4 Jur. N. S. 288; *Harrison v. Elvin*, 3 Q. B. 117; s. c., 2 Gale & D. 769, 6 Jur. 849; *In re Pope*,

be signed or subscribed by another, he taking no physical part in the act. This matter was fully considered in a New Hampshire case, in which it was held that the name of an attesting witness who is unable to write may be written by another, at his request, in his presence and in the presence of the testator. "One object of the statute," said the court, "in requiring an attestation of a will is to insure identity and prevent the fraudulent substitution of another document. Another object is to surround the testator with witnesses to judge of his capacity. And all these purposes are as readily attained in the case where the name of the attesting witness is written by the agent at the request of the principal, as where the latter makes his mark or holds a pen guided by another hand."⁴⁹

There is strong authority that a witness must take part in some physical act whereby his name as a witness is

139 N. C. 484, 111 Am. St. Rep. 813, 4 Ann. Cas. 635, 7 L. R. A. (N. S.) 1193, 52 S. E. 235.

Where one witness, not knowing how to write his name, the other, besides attesting as a witness to the will, wrote the name of the first-mentioned witness and signed again as a witness to the mark of the first-mentioned witness, it was held sufficient.—In *re Derry's Estate*, Myrick's Prob. (Cal.) 202.

Contra: Where one of the attesting witnesses signs for the testator, at his express request, and then signs in attestation, he can not guide the hand of the other witness in attestation.—

Dawkins v. Dawkins, 179 Ala. 666, 60 So. 289.

⁴⁹ Lord v. Lord, 58 N. H. 7, 42 Am. Rep. 565. See, also, *Upchurch v. Upchurch*, 16 B. Mon. (55 Ky.) 102; *Matter of Strong's Will*, 2 Con. Sur. 574, 16 N. Y. Supp. 104; 39 N. Y. St. Rep. 852; *In re Crawford*, 46 S. C. 299, 57 Am. St. Rep. 684, 32 L. R. A. 77, 24 S. E. 69; *Jesse v. Parker's Admrs.*, 6 Grat. (Va.) 57, 52 Am. Dec. 102.

"There are many cases, English and American, which hold the strict doctrine that the witness must himself do some manual act in order to make a valid attestation. The American cases of this

affixed to the will.⁵⁰ It would seem that the English cases limit the privilege of one subscribing the name of a witness to a will for him to those cases where the witness himself can not write.⁵¹ But where it is allowable for a witness to sign by mark or to have another write his name, unless restricted by statute as in Georgia⁵² and Louisiana,⁵³ it is not limited to those instances where the witness can not or is unable to write. It is true that, as a matter of fact, in most cases where the witness has been allowed to sign in this way, he was unable to write; but this fact has not been regarded as essential and should not be controlling.⁵⁴

character do not appear to have been very thoroughly considered, the courts being apparently content to rest upon the authority of certain English decisions, the grounds and reasons of which are not very fully presented."—Lord v. Lord, 58 N. H. 7, 10, 42 Am. Rep. 565.

In *Chase v. Kittredge*, 11 Allen (Mass.) 49, 87 Am. Dec. 687, Justice Gray said: "A subscription of the name or mark of a witness by another person in the presence of himself and the testator might possibly be a literal compliance with the statute; but not being in the handwriting of the witness, would create no presumption of a lawful execution and attestation without affirmative evidence that it was so made."

⁵⁰ *Moore v. King*, 3 Curt. 243; *Riley v. Riley*, 36 Ala. 496; *Horton v. Johnson*, 18 Ga. 396; *Campbell*

v. Logan, 2 Bradf. (N. Y.) 90; *Meehan v. Rourke*, 2 Bradf. (N. Y.) 385; *In re Pope*, 139 N. C. 484, 111 Am. St. Rep. 813, 4 Ann. Cas. 635, 7 L. R. A. (N. S.) 1193, 52 S. E. 235; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; *McFarland v. Bush*, 94 Tenn. 538, 45 Am. St. Rep. 760, 27 L. R. A. 662, 29 S. W. 899.

Georgia Civil Code, (Park's) 1914, by § 3847, provides that one witness can not subscribe the name of another, although a witness may attest by mark.

⁵¹ *In re Killeher*, 6 Notes of Cas. 15.

⁵² Georgia Civ. Code, (Park's) 1914, § 3847.

⁵³ Louisiana, Merrick's Rev. Civ. Code, 1913, art. 1579.

⁵⁴ *In re Pope*, 139 N. C. 484, 111 Am. St. Rep. 813, 4 Ann. Cas. 635, 7 L. R. A. (N. S.) 1193, 52 S. E. 235.

§ 496. Witnesses Should Sign After Execution by Testator Has Been Completed: Strict Rule.

It is the general rule that the signing in attestation by the witnesses should follow, in point of time, the signing by the testator, or his acknowledgment of his signature, and the publication of the will, where that formality is required.⁵⁵ A witness, of course, can not properly sign in attestation of something yet to be done, but if all is part of one transaction, a more liberal view

⁵⁵ *Cooper v. Bockett*, 3 Curt. 648; *Duffie v. Corridon*, 40 Ga. 122; *Brooks v. Woodson*, 87 Ga. 379, 14 L. R. A. 160, 13 S. E. 712; *Reed v. Watson*, 27 Ind. 443; *Chisholm's Heirs v. Ben*, 7 B. Mon. (46 Ky.) 408; *Chase v. Kittredge*, 11 Allen (Mass.) 49, 87 Am. Dec. 687; *Marshall v. Mason*, 176 Mass. 216, 79 Am. St. Rep. 305, 57 N. E. 344; *Schermerhorn v. Merritt*, 123 Mich. 310, 82 N. W. 513, 83 N. W. 405; *Tobin v. Haack*, 79 Minn. 101, 81 N. W. 758; *Mickle v. Matlack*, 17 N. J. Law 86; *Lacey v. Dobbs*, 63 N. J. Eq. 325, 92 Am. St. Rep. 667, 55 L. R. A. 580, 50 Atl. 497; *Jackson v. Christman*, 4 Wend. (N. Y.) 277, 282; *Peck v. Cary*, 27 N. Y. 9, 31, 84 Am. Dec. 220; *Sisters of Charity v. Kelly*, 67 N. Y. 409; *In re Phillips*, 98 N. Y. 267; *Eelbeck's Devisees v. Granberry*, 3 N. C. 232; *In re Irvine's Estate*, 206 Pa. St. 1, 55 Atl. 795.

Compare: *In re Summers*, 7 Notes of Cas. 562; s. c., 14 Jur. 791; s. c., 2 Rob. Ecc. 295.

Contra: *Pollock v. Glaßsell*, 2

Grat. (Va.) 439; *Rosser v. Franklin*, 6 *Grat. (Va.)* 1, 52 Am. Dec. 97; *Sturdivant v. Birchett*, 10 *Grat. (Va.)* 67; *Parramore v. Taylor*, 11 *Grat. (Va.)* 220.

See, ante, §§ 447, 448. Signing of testator should precede that by witnesses.

See, ante, §§ 423-426, as to effect of part of will following signatures of testator and witnesses.

"The words of the section are very precise, and I think it would be attended with dangerous consequences if the court were to hold a will valid which had been signed in the presence of two witnesses, who have attested it before the signature of the testator was affixed to the will; for where is the court to draw the line? Suppose the witnesses attested one hour before the testator signed, or a day, or a week, or any other time, where is the court to stop if it gave a latitude of construction to this section of the act?" — *Cooper v. Bockett*, 3 Curt. 648, 659, 660.

should be taken. In those courts where the rule is strictly applied, if a witness sign before the testator has written his name, it is not a valid attestation.⁵⁶ No authority is given to the witnesses, as in the case of the testator, to acknowledge their signatures previously written.⁵⁷ Going over with a dry pen a signature previously made is no more than equivalent to acknowledgment and will not take the place of signing in the presence of the tes-

⁵⁶ In re Cox's Will, 46 N. C. 321; In re Olding, 2 Curt. 865; In re Byrd, 3 Curt. 117; Hudson v. Parker, 1 Rob. Ecc. 14, 39; Shaw v. Neville, 1 Jur. N. S. 408; Charlton v. Hindmarsh, 1 Sw. & Tr. 433; s. c., 8 H. L. Cas. 160; In re Cunningham, 4 Sw. & Tr. 194, 29 L. J. Prob. (N. S.) 71; In re Hoskins, 32 L. J. Prob. (N. S.) 158; Rash v. Purnel, 2 Har. (Del.) 448, 458; Pennel's Lessee v. Weyant, 2 Har. (Del.) 501, 506; Chase v. Kittredge, 11 Allen (Mass.) 49, 87 Am. Dec. 687; Barnes v. Chase, 208 Mass. 490, 94 N. E. 694; Jackson v. Jackson, 39 N. Y. 153; Ragland v. Huntingdon, 23 N. C. 561; Graham v. Graham, 32 N. C. 219.

Contra: Sturdivant v. Birchett, 10 Grat. (Va.) 67; Parramore v. Taylor, 11 Grat. (Va.) 220.

⁵⁷ Ellis v. Smith, 1 Ves. Jun. 11; s. c., 1 Dick. 225; Playne v. Scriven, 1 Rob. Ecc. 772, 775; s. c., 7 Notes of Cas. 122; In re Trevanion, 2 Rob. Ecc. 311; In re Cope, 2 Rob. Ecc. 335; Hoil v. Clark, 3 Mod. 219; Lee v. Libb, 1 Show. (K. B.) 69; In re Allen, 2 Curt. 331; Moore v. King, 3 Curt. 243;

s. c., 2 Notes of Cas. 45; In re Simmonds, 1 Notes of Cas. 409; s. c., 3 Curt. 79; In re Mead, 1 Notes of Cas. 456; In re White, 2 Notes of Cas. 461; s. c., 7 Jur. 1045; Hands v. James, 2 Comyns 532; Onions v. Tyrer, 1 P. Wms. 344; Dormer v. Thurland, 2 P. Wms. 506; Racliffe v. Parkyns, 6 Dow. 202; Lamb v. Girtman, 33 Ga. 289; Duffie v. Corridon, 40 Ga. 122; Reed v. Watson, 27 Ind. 443; Pope v. Pope, 4 Pick. (Mass.) 129; Chase v. Kittredge, 11 Allen (Mass.) 49, 87 Am. Dec. 687; Mendell v. Dunbar, 169 Mass. 74, 61 Am. St. Rep. 277, 47 N. E. 402; Maynard v. Vinton, 59 Mich. 139, 60 Am. Rep. 276, 26 N. W. 401; Lord v. Lord, 58 N. H. 7, 42 Am. Rep. 565; Den v. Mitton, 12 N. J. L. 70; Mickle v. Matlack, 17 N. J. L. 86; Pawtucket v. Ballou, 15 R. I. 58, 2 Am. St. Rep. 868, 23 Atl. 43; Downie's Will, 42 Wis. 66.

Compare: Patterson v. Ransom, 55 Ind. 402.

Contra: Sturdivant v. Birchett, 10 Grat. (Va.) 67; Parramore v. Taylor, 11 Grat. (Va.) 220.

tator. There must be some act apparent upon the face of the paper.⁵⁸ Neither will it be sufficient to add the name of the witness's place of residence,⁵⁹ nor to add a date and to cross a defective letter.⁶⁰

§ 497. The Same Subject: Liberal Rule.

Other courts have given a latitude of construction to this section of the statute, holding that, provided the signature or acknowledgment of the testator and the attestation of the witnesses be accomplished upon one occasion and as part of one transaction, it is immaterial in what order the acts are performed.⁶¹ Likewise when, after the first witness had signed, the testator inserted some immaterial words and then acknowledged the exe-

⁵⁸ *Playne v. Scriven*, 1 Rob. Ecc. 772; s. c., 7 Notes of Cas. 122; s. c., 13 Jur. 712; *In re Cunningham*, 4 Sw. & Tr. 192; s. c., 29 Law J. Prob. 71; *In re Maddock*, L. R. 3 P. & D. 169.

⁵⁹ *In re Trevanion*, 2 Rob. Ecc. 311.

⁶⁰ *Charlton v. Hindmarsh*, 1 Sw. & Tr. 433; s. c., 8 H. L. Cas. 160.

⁶¹ *O'Brien v. Gallagher*, 25 Conn. 229; *Swift v. Wiley*, 1 B. Mon. (40 Ky.) 114, 117; *Upchurch v. Upchurch*, 16 B. Mon. (55 Ky.) 102, 113; *Sechrest v. Edwards*, 4 Metc. (61 Ky.) 163; *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808, 27 S. E. 16; *Cutler v. Cutler*, 130 N. C. 1, 89 Am. St. Rep. 854, 57 L. R. A. 209, 40 S. E. 689; *Pollock v. Glassell*, 2 Grat. (Va.) 439; *Sturdivant v. Birchett*, 10 Grat. (Va.) 67; *Parramore v. Taylor*, 11 Grat. (Va.) 220.

Compare: *In re Collins*, 5 Redf. (N. Y.) 20; *Patterson v. Ransom*, 55 Ind. 402; *Miller v. McNeill*, 35 Pa. St. 217, 78 Am. Dec. 333.

Where one witness signs in anticipation of the execution and the other after the testator has signed, this is good provided the testator is present on each occasion.—*Limbach v. Bolin*, 169 Ky. 204, 183 S. W. 495; *Horn's Estate v. Bartow*, 161 Mich. 20, 20 Ann. Cas. 1364, 26 L. R. A. (N. S.) 1126, 125 N. W. 696.

In Maryland it has been held that although the witnesses did not in fact write or subscribe the will at one time, yet if when afterward, all together and in the presence of the testator, those who had written their names previously reaffirm their signatures, it is a valid attestation.—*Moale v. Cutting*, 59 Md. 510.

cution of the will in the presence of both witnesses, it was considered a valid execution.⁶² So, too, where the statute does not require the attesting witnesses to sign the will, as in Pennsylvania, or when it does not contain the phrase "in the presence of the testator," acknowledgment may take the place of signing in the testator's presence.⁶³

§ 498. Position of Signatures of Witnesses.

The provisions of the Statute of Frauds and the Victorian Statute of Wills merely required the witnesses to subscribe their names, but did not otherwise designate the position of their signatures. Under these statutes it is held that the names of the witnesses may be written in any part of the will, although the term "subscribe" is employed in both acts.⁶⁴ This doctrine has been carried so far as to hold, that where one of the witnesses signed his name opposite the word "executors," upon the request of the testator to sign "in that character," he did not sign exclusively as executor, but that he also intended to affirm that the deceased executed the

⁶² *Bateman v. Mariner*, 5 N. C. 176.

⁶³ *Ruddon v. McDonald*, 1 Bradf. (N. Y.) 352; *Campbell v. Logan*, 2 Bradf. (N. Y.) 90; *Vaughan v. Burford*, 3 Bradf. (N. Y.) 78; *Ex parte Leroy*, 3 Bradf. (N. Y.) 227; *Miller v. McNeill*, 35 Pa. St. 217, 78 Am. Dec. 333; *Pollock v. Glas-sell*, 2 Grat. (Va.) 439.

Compare: *Chase v. Kittredge*, 11 Allen (Mass.) 49, 87 Am. Dec. 687; *Hoysradt v. Kingman*, 22 N. Y. 372.

⁶⁴ *In re Chamney*, 1 Rob. Ecc. 757; s. c., 7 Notes of Cas. 70; *Goods of Braddock*, L. R. 1 P. Div. 433; *Roberts v. Phillips*, 4 El. & B. 450; s. c., 24 L. J. Q. B. 171.

"The mere requisition that the will shall be subscribed by the witnesses we think is complied with by the witnesses, who saw it executed by the testator, immediately signing their names on any part of it, at his request, with the intention of attesting it." —*Roberts v. Phillips*, 4 El. & B. 450.

will in his presence and that the attestation is valid.⁶⁵ If any portion of the will follows the signatures, evidence is admissible to show that it was written prior to the attestation.⁶⁶ Neither have the American courts always held it material in what part of the instrument the witnesses sign, if they do so after the subscription and acknowledgment of the will by the testator, and with the purpose of signing as attesting witnesses.⁶⁷ Thus, in Texas, it is of no importance that witnesses to a will sign in, instead of after, the attestation clause.⁶⁸ And in Maryland, if the witnesses sign above the attestation clause, instead of below, it will not render the will invalid.⁶⁹ In other states, a stricter rule is found requiring the attesting signatures to be at the foot or end of the will, as in Kentucky. It is also required by the statutes of New York, California, Arkansas, Montana,⁷⁰ Dakota, and Utah.⁷¹ Where, as in New York, the statute declares that attesting witnesses shall sign their names at the end of the will, this requirement is imperative.⁷²

§ 499. Witnesses Must Sign Their Names *Animo Testandi*.

In all cases in which there is any irregularity in the position of the names of the witnesses the court must be satisfied that they were written *animo testandi*. Where,

⁶⁵ Griffiths v. Griffiths, L. R. 2 P. & D. 300.

⁶⁶ In re Jones, 1 Notes of Cas. 396.

⁶⁷ Fowler v. Stagner, 55 Tex. 393; Potts v. Felton, 70 Ind. 166.

⁶⁸ Franks v. Chapman, 64 Tex. 159.

⁶⁹ Moale v. Cutting, 59 Md. 510.

⁷⁰ Soward v. Soward, 1 Duvall (62 Ky.) 126.

⁷¹ See synopsis of statutes, Appendix, this volume.

⁷² Matter of Case, 4 Demarest (N. Y.) 124, 1 N. Y. St. Rep. 152; Matter of Dayger, 47 Hun (N. Y.) 127; Matter of Blair's Will, 84 Hun (N. Y.) 581, 32 N. Y. Supp. 845; Matter of Beck's Will, 6 App. Div. 211, 39 N. Y. Supp. 810; Matter of Conway, 124 N. Y. 455, 11 L. R. A. 796, 26 N. E. 1028.

therefore, a will was written on one page of a foolscap sheet of paper and the testator's signature appeared at the end of that page, with the words, "Witness, William Hatton," and under a memorandum not testamentary at the top of the second page of the same sheet the names of three persons were subscribed, the court came to the conclusion, from the position of the three names, the nature of the memorandum, and the circumstances of the case, that they were not placed there for the purpose of attesting the will, but probably to signify their acceptance of a trust.⁷³ A will written on two sides of a piece of paper, signed by the witnesses at the bottom of the first and top of the other side, an important provision following the last signatures, was held not to be executed in compliance with the statute.⁷⁴ If the will consists of several sheets of paper, it is not necessary that each sheet be signed by the witnesses.⁷⁵ But the signatures of the witnesses must be either upon the same sheet as the signature of the testator, or on some sheet physically connected with it.⁷⁶ The whole will must be in the presence of the witnesses at the time they attest and subscribe the same.⁷⁷

⁷³ *In re Wilson*, L. R. 1 P. & D. 269; *Dunn v. Dunn*, L. R. 1 P. & D. 277.

⁷⁴ *In re Hewitt's Will*, 91 N. Y. 261.

⁷⁵ *Bond v. Seawell*, 3 Burr. 1773; *Jones v. Habersham*, 63 Ga. 146; *Wikoff's Appeal*, 15 Pa. St. 281, 53 Am. Dec. 597; *Ela v. Edwards*, 16 Gray (Mass.) 91, 99.

See, ante, § 64, as to the presumption where a will consists of several sheets.

⁷⁶ *In re Baldwin's Will*, 145 N. C. 25, 125 Am. St. Rep. 466, 59 S. E. 163.

⁷⁷ "It is possible, when a will is written on separate sheets of paper loosely fastened together, that one or more sheets might be removed and others substituted; but the possibility of this being done is not sufficient to justify denying the admission of a will to probate. It is not necessary to the validity of a will that it

§ 500. Witnesses Must Sign "in the Presence of the Testator."

Practically all of the statutes relating to the execution of wills require that the attesting witnesses sign or subscribe their names "in the presence of the testator." This was demanded by the Statute of Frauds, by the Victorian Statute of Wills, and in those of nearly every state of the Union.⁷⁸ The requirement is absolute, when demanded by statute; and as the object of the rule re-

should be all written on one sheet of paper. All that is required is that the whole will shall be in the presence of the witnesses when attested by them."—*Palmer v. Owen*, 229 Ill. 115, 118, 82 N. E. 275.

⁷⁸ *Lockridge v. Brown*, 184 Ala. 106, 63 So. 524; *International Trust Co. v. Anthony*, 45 Colo. 474, 16 Ann. Cas. 1087, 22 L. R. A. (N. S.) 1002, 101 Pac. 781; *Schofield v. Thomas*, 236 Ill. 417, 86 N. E. 122; *Cunningham v. Cunningham*, 80 Minn. 180, 81 Am. St. Rep. 256, 51 L. R. A. 642, 83 N. W. 58; *Church of St. Vincent de Paul v. Brannan* (In re Brannan's Estate), 97 Minn. 349, 107 N. W. 141; *Berst v. Moxom*, 163 Mo. App. 123, 145 S. W. 857; *Avaro v. Avaro*, 235 Mo. 424, 138 S. W. 500; In re Baldwin's Will, 146 N. C. 25, 125 Am. St. Rep. 466, 59 S. E. 163; In re Bowling's Will (Umstead v. Bowling), 150 N. C. 507, 64 S. E. 368.

See synopsis of statutes, Appendix, this volume.

In Pennsylvania, subscription by attesting witnesses is not nec-

essary except in cases of charitable devises or bequests.—*Purdon's Dig. Pa. Laws*, 13th ed., pp. 5120, 5129.

In New York, each of the attesting witnesses must sign his name as a witness, at the end of the will, at the request of the testator, but the statute does not specify that the signing must be in the presence of the testator.—*N. Y. Cons. Laws*, 1909, ch. 18, § 21.

For this reason the doctrine of the witnesses being constructively in the presence of the testator, hereinafter treated, is not now of practical interest in that state.—4 Kent Com. *515; *Lyon v. Smith*, 11 Barb. (N. Y.) 124; *Ruddon v. McDonald*, 1 Bradf. (N. Y.) 352; *Matter of Phillips' Will*, 34 Misc. Rep. 442, 69 N. Y. Supp. 1011; In re Jones' Will, 85 N. Y. Supp. 294.

The Arkansas statute is practically the same as that of New York, the term "presence of witnesses" being omitted in regard to the signing by witnesses.—*Arkansas, Kirby & Castle's Dig. of*

quiring witnesses to be present to protect the testator from fraud and the substitution of a different paper in the place of the one signed by him, it is immaterial what may have caused the absence of one or all of the witnesses.⁷⁹

§ 501. What Constitutes "in the Presence of the Testator."

It is difficult to lay down any one general rule under which all the cases defining "the presence of the testator" may be reconciled. While some of the decisions maintain that the provision should be liberally construed in conformity with the spirit of the statute,⁸⁰ holding it sufficient that the testator might have seen the witnesses while subscribing their names had he chosen to do so,⁸¹ it has, on the other hand, been held that he must

Stats. 1916, § 10051; *Matter of Cornelius' Will*, 14 Ark. 675.

In Tennessee, wills of personalty are not required to be signed by witnesses.—*Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; *Long v. Mickler*, 133 Tenn. 51, 179 S. W. 477.

As to acknowledgment of his signature, previously signed, by a witness, see, ante, § 495.

⁷⁹ *Broderick v. Broderick*, 1 P. Wms. 239; *Machell v. Temple*, 2 Show. 288.

Although both witnesses saw the testator sign and heard him declare the instrument to be his last will and testament, yet as one of them signed in attestation out of the presence of the testator, it was held fatal, the court saying: "No other result may be

reached except through a process of illogical, strained and unsupported reasoning."—*International Trust Co. v. Anthony*, 45 Colo. 474, 16 Ann. Cas. 1087, 22 L. R. A. (N. S.) 1002, 101 Pac. 781.

⁸⁰ *Montgomery v. Perkins*, 2 Metc. (59 Ky.) 448, 74 Am. Dec. 419.

⁸¹ *McElfresh v. Guard*, 32 Ind. 408; *Turner v. Cook*, 36 Ind. 129; *Ambre v. Weishaar*, 74 Ill. 109; *Aikin v. Weckerly*, 19 Mich. 482; *In re Downie's Will*, 42 Wis. 66, n. 2.

Compare: *Longford v. Eyre*, 1 P. Wms. 740; *Casson v. Dade*, 1 Bro. C. C. 99; *Winchilsea v. Wauchope*, 3 Russ. 443; *Dewey v. Dewey*, 1 Metc. (42 Mass.) 349, 35 Am. Dec. 367.

not only be able to see the witnesses, but must be able also to see their proceedings in the act of subscription.⁸² It is believed, however, that most of the cases may be placed under one or the other of the following propositions:

1. The presence contemplated by the statute is not simply the bodily presence of the testator; it is essential that he be also mentally capable of recognizing and actually conscious of the act performed before him.⁸³

2. If the witnesses be in the same room with the testator, and he be not hindered in his movements by bodily infirmity nor otherwise prevented from seeing them, it is conclusive presumption of law that the subscription was "in his presence," and it does not invalidate the will to show that he did not actually see the witnesses in the process of writing their names.⁸⁴ Where the evidence

⁸² *Graham v. Graham*, 32 N. C. 219.

⁸³ *Longford v. Eyre*, 1 P. Wms. 740; *Right v. Price*, 1 Doug. 241; *Orndorff v. Hummer*, 12 B. Mon. (51 Ky.) 619; *In re Allen's Will*, 25 Minn. 39; *Watson v. Pipes*, 32 Miss. 451; *Vernam v. Spencer*, 3 Bradf. (N. Y.) 16.

⁸⁴ *Davy v. Smith*, 3 Salk. 395; *Casson v. Dade*, 1 Bro. C. C. 99; *Goods of Trimmell*, 11 Jur. N. S. 248; *Longford v. Eyre*, 1 P. Wms. 740; *Tod v. Winchelsea*, 2 Car. & P. 488; *Newton v. Clarke*, 2 Curt. 320; *In re Killick*, 3 Sw. & Tr. 578, 34 L. J. Prob. 2; *Hill v. Barge*, 12 Ala. 687; *Burnham v. Grant* (*In re Burnham's Will*), 24 Colo. App. 131, 134 Pac. 254; *Reed v. Roberts*, 26 Ga. 294, 71 Am. Dec.

210; *Hamlin v. Fletcher*, 64 Ga. 549; *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368; *Turner v. Cook*, 36 Ind. 129, 136; *Russell v. Falls*, 3 Har. & McH. (Md.) 457, 463, 1 Am. Dec. 380; *Edelen v. Hardey's Lessee*, 7 Har. & J. (Md.) 61, 16 Am. Dec. 292; *Aikin v. Weckerly*, 19 Mich. 482; *Cook v. Winchester*, 81 Mich. 581, 8 L. R. A. 822, 46 N. W. 106; *In re Allen's Will*, 25 Minn. 39; *Cunningham v. Cunningham*, 80 Minn. 180, 81 Am. St. Rep. 256, 51 L. R. A. 642, 83 N. W. 58; *Walker v. Walker*, 67 Miss. 529, 7 So. 491; *Healey v. Bartlett*, 73 N. H. 110, 6 Ann. Cas. 413, 59 Atl. 617; *In re Cherry's Will*, 164 N. C. 363, 79 S. E. 288; *Hopkins v. Wheeler*, 21 R. I. 533, 79 Am. St. Rep. 819, 45 Atl. 551.

fails to show in what part of a room the subscription took place, it will be presumed to have been at the most

If the witnesses when signing a will are in such a place that the testator can see them if he chooses, they are in his presence.—*Burnham v. Grant* (In re *Burnham's Will*), 24 Colo. App. 131, 134 Pac. 254; *Ambre v. Weishaar*, 74 Ill. 109.

"The evidence upon this branch of the case tends to show that the will was signed by the testator upon a table adjoining his sick bed, and that it was signed by the witnesses immediately after he signed it upon the same table and in his immediate presence." Will admitted to probate.—*Church of St. Vincent de Paul v. Brannan* (In re *Brannan's Estate*), 97 Minn. 349, 107 N. W. 141.

It is not necessary that the testator actually see the witnesses sign the will, if they are in his presence and the situation is such that he could see them if he so wished.—*In re Cherry's Will*, 164 N. C. 363, 79 S. E. 288.

"In other words, if he has knowledge of their presence, and can, if he is so disposed, readily see them write their names, the will is attested in his presence, even if he does not see them do it and could not without some slight physical exertion. It is not necessary that he should actually see the witnesses for them to be in his presence. They are in his

presence whenever they are so near him that he is conscious of where they are and of what they are doing, through any of his senses, and are where he can readily see them if he is so disposed. The test, therefore, to determine whether the will of a person who has the use of all his faculties is attested in his presence, is to inquire whether he understood what the witnesses were doing when they affixed their names to his will, and could, if he had been so disposed, readily have seen them do it."—*Healey v. Bartlett*, 73 N. H. 110, 6 Ann. Cas. 414, 59 Atl. 617.

Compare: In a case in Massachusetts, where the witnesses subscribed their names in an adjoining room in the line of vision of the testator, who, however, could not see them, being able to look upward only, yet could hear and was perfectly conscious of what was being done, and the attestation was held to be "in the presence" of the testator.—*Riggs v. Riggs*, 135 Mass. 238, 46 Am. Rep. 464.

This case stands almost if not entirely alone, and the authorities to the contrary are numerous.—*Eccleston v. Petty*, Carth. 79; s. c., Comb. 156; s. c., 1 Show. 89; Cas. Temp. Holt. 222; *In re Newman*, 1 Curt. 914; *In re Ellis*, 2 Curt. 395; *In re Colman*, 3 Curt. 118;

convenient place, and the ordinary position of a table likely to have been used will be taken into consideration.⁸⁵

3. If the witnesses be in the same room with the testator and he be hindered in his movements by bodily infirmity or otherwise, it is a disputable presumption of law that the subscription was "in his presence," and if it be shown that he could not see the witnesses in the process of writing their names without assistance from another, or pain, or inconvenience, or danger to life, it will invalidate the will.⁸⁶

Broderick v. Broderick, 1 P. Wms. 239; *Machell v. Temple*, (K. B.) 2 Show. 288; *Doe d. Wright v. Manifold*, 1 Maule & S. 294; *Boldry v. Parris*, 2 Cush. (Mass.) 433; *Reynolds v. Reynolds*, 1 Speers L. (S. C.) 253, 40 Am. Dec. 599.

⁸⁵ *Winchilsea v. Wauchope*, 3 Russ. 441, 444.

Compare: There is no presumption of the presence of the testator and, in default of a statement of such presence in the attestation clause, his presence must be proved before the will can be admitted to probate.—*Schofield v. Thomas*, 236 Ill. 417, 86 N. E. 122.

⁸⁶ *Tribe v. Tribe*, 1 Rob. Ecc. 775; s. c., 13 Jur. 793; s. c., 7 Notes of Cas. 132; *Doe d. Wright v. Manifold*, 1 Maule & S. 294; *Jones v. Tuck*, 48 N. C. 202; *Russell v. Falls*, 3 Har. & McH. (Md.) 457, 463, 1 Am. Dec. 380; *Neil v. Neil*, 1 Leigh (Va.) 6.

"The bare subscribing of the will by the witnesses in the same

room does not necessarily imply it to be in the testator's presence; for it might be in a corner of the room, in a clandestine, fraudulent way."—*Longford v. Eyre*, 1 P. Wms. 740.

Presence of the testator necessary for the act of signing in attestation means in a situation such as the testator is enabled to see the act. In this connection it is immaterial that the testator is too feeble to move so as to observe what is going on.—*Gordon v. Gilmore*, 141 Ga. 347, 80 S. E. 1007.

A will is not witnessed in the presence of the testator unless he either sees the witnesses sign, or be in a position to see them sign.—*In re Herring's Will*, 152 N. C. 258, 67 S. E. 570.

In *Neil v. Neil*, 1 Leigh (Va.) 6, 27, a very fully argued case in point, it was said: "Nor is there any case which intimates that where the testator is in such a situation that he can not see the

4. If the witnesses be not in the same room with the testator, it is a disputable presumption of law that the subscription was not "in his presence," and unless it be shown that he actually saw them in the process of writing their names the will is not valid.⁸⁷ This rule,

subscription of the witnesses, by means of his own power and volition as above mentioned, it is sufficient to satisfy the requisition of the statute that he might cause himself, or the witnesses, to be placed in such a situation as that he might see their attestation."

⁸⁷ Doe d. Wright v. Manifold, 1 Maule & S. 294; Norton v. Bazzett, 1 Deane & Sw. 259; s. c., 3 Jur. N. S. 1084; Newton v. Clark, 2 Curt. 320; In re Colman, 3 Curt. 118; In re Killick, 3 Sw. & Tr. 578, 34 L. J. Prob. 2; Jenner v. Finch, L. R. 5 Prob. Div. 106; Hill v. Barge, 12 Ala. 687; Robinson v. King, 6 Ga. 539; Russell v. Falls, 3 Har. & McH. (Md.) 457, 463, 1 Am. Dec. 380; Edelen v. Hardey's Lessee, 7 Har. & J. (Md.) 61, 16 Am. Dec. 292; Mandeville v. Parker, 31 N. J. Eq. 242; Moore v. Moore's Exr., 8 Grat. (Va.) 307.

The persons signing as attesting witnesses were, during the process of so signing, in a separate room from that in which the testatrix was. From her situation she could not see them, but she might have done so by getting up and putting her head in at the doorway between the rooms. She had been in the

room, had signed at the same table and been then assisted out. She had said nothing as to the instrument being her will, nor in request that these persons sign as witnesses. Probate was denied.—Schofield v. Thomas, 236 Ill. 417, 86 N. E. 122.

The testator and witnesses need not be in the same room at the time of executing a will. They are in each other's presence if the arrangement of the room is such that there is an opportunity on the part of each to see the others.—Bogert v. Bateman, (N. J.) 65 Atl. 238.

The testator, a man aged eighty-four years, went to the store of C. & L. with F. in order that F. and L. might witness his will. The testator produced the signed instrument and the two others took it into a "little room" in the store where C. was accustomed to do his writing, where they signed it in attestation. The testator was outside the open window about two or three feet away, and could have seen the operation had he wanted to. The attestation was held good.—In re Bowling's Will (Umstead v. Bowling), 150 N. C. 507, 64 S. E. 368.

however, does not embrace some English cases which hold that although the witnesses be in another room, if the witnesses signed in the line of vision of the testator and he could have seen them, it is not essential to prove that he did so.⁸⁸

§ 502. Witnesses Signing in a Different Room.

When the subscription by the witnesses takes place in a different room from that in which the testator is confined in bed, or in a room where a partition or closed door might separate the testator from the witnesses, the latter are not strictly in the presence of the testator. But if the testator can by a slight change of position, such as turning his head, view the act of subscription, the witnesses are *constructively* in his presence, therein differing from being in his actual presence. Such constructive presence is sufficient to answer the requirements of the statute, but it must be limited. The testator should have the physical ability to change his position, in addition to the mental ability to comprehend what he is doing, so

⁸⁸ Shires v. Glascock, 2 Salk. 688; s. c., 1 Eq. Cas. Abr. 403; Davy v. Smith, 3 Salk. 395; Casson v. Dade, 1 Bro. C. C. 99; Tod v. Winchelsea, 2 Car. & P. 488; Sturdivant v. Birchett, 10 Grat. (Va.) 67; Nock v. Nock's Exrs., 10 Grat. (Va.) 106, 108.

Compare: Norton v. Bazett, 1 Deane & Sw. 259; s. c., 3 Jur. N. S. 1084; where the witnesses were out of the line of the testator's vision, the will being rejected.—Goods of Killick, 3 Sw. & Tr. 578, 34 L. J. Prob. 2.

In Goods of Killick, 3 Sw. &

Tr. 578, 34 L. J. Prob. 2, where the witnesses signed in the next room, the door being open, and by raising her head the testatrix, who was sick in bed, could have seen them sign, but not otherwise. She had not seen them, did not know they were signing or even know they were there. Sir J. P. Wilde said: "I think such an act as this can not be said to be done by one person in the presence of another, unless at the time each is aware of the other's presence." To the same effect, see Jenner v. Finch, L. R. 5 Pro. Div. 106.

as to be able to actually see the subscription by the witnesses; and the signing should be within easy view of the testator, for if more than slight effort is required on the part of the testator in order to see the act of signing, he might not know which way to turn.⁸⁹

§ 503. Blind Testator: What Constitutes "in His Presence."

The rule that witnesses can not be said to be in the "presence of the testator" unless they are within a reasonable degree of proximity where, unaided, the testator may easily view them, has reference only to those cases where the testator has the faculty of sight. Most men can see, and vision is the usual and safest test of presence, but it is not the only test. A blind man may note the presence of another through the sense of touch or hearing. The rule now generally adopted is that, although one may have lost his sense of sight, if his mind is unaffected and he is sensible of what is being done, if witnesses subscribe his will in the same room or within reasonable close proximity and within his hearing, they subscribe in his presence.⁹⁰

⁸⁹ Orndorff v. Hummer, 12 B. Mon. (51 Ky.) 619; McKee v. McKee's Exr., 155 Ky. 738, 160 S. W. 263.

⁹⁰ Bynum v. Bynum, 33 N. C. 632; In re Allred's Will, 170 N. C. 153, Ann. Cas. 1916D, 788, 86 S. E. 1047; In re Pickett's Will, 49 Ore. 127, 89 Pac. 377; Reynolds v. Reynolds, 1 Speers L. (S. C.) 253, 40 Am. Dec. 599; Ray v. Hill, 3 Strob. L. (S. C.) 297, 302, 49 Am. Dec. 647; Neil v. Neil, 1 Leigh (Va.) 6, 23 (dictum).

See, also, Riggs v. Riggs, 135

Mass. 238, 46 Am. Rep. 464; Raymond v. Wagner, 178 Mass. 315, 59 N. E. 811; Maynard v. Vinton, 59 Mich. 139, 60 Am. Rep. 276, 26 N. W. 401; Healey v. Bartlett, 73 N. H. 110, 6 Ann. Cas. 413, 59 Atl. 617.

Where the witnesses to the will of a blind man signed about four feet distant from him, it was held in the presence of the testator.—In re Allred's Will, 170 N. C. 153, Ann. Cas. 1916D, 788, 86 S. E. 1047.

Where it was stated in the pres-

It has been said that in the case of a blind testator the witnesses should occupy a position such that he might see them had he the sense of sight.⁹¹ Evidently the better rule is that they should be within the cognizance of his remaining senses.⁹² It is not necessary that a will should be read to a blind testator in the presence of the witnesses,⁹³ although proof will always be required that persons suffering from such infirmity or those who are illiterate had in some way acquired a knowledge of the contents of the paper.⁹⁴

§ 504. Witnesses Signing in the Presence of Each Other.

Under the Statute of Frauds where the requirement was that the will should be attested and subscribed in the presence of the testator by three or more credible witnesses, it became well settled at a very early date that a will of real estate, attested by three witnesses who had at several times subscribed their names in the presence of the testator and at his request, was valid, although all the witnesses were never present at the

ence of the testator, who was blind, that two persons were to act as witnesses to his will, and they were so requested by his attorney, in his presence, the request was sufficient.—*In re Pickett's Will*, 49 Ore. 127, 89 Pac. 377.

⁹¹ *In re Piercy*, 1 Rob. Ecc. 278. See, also, *Raymond v. Wagner*, 178 Mass. 315, 59 N. E. 811; *Maynard v. Vinton*, 59 Mich. 139, 60 Am. Rep. 276, 26 N. W. 401; *Healey v. Bartlett*, 73 N. H. 110, 6 Ann. Cas. 413, 59 Atl. 617.

⁹² *Reynolds v. Reynolds*, 1

Speers L. (S. C.) 253, 40 Am. Dec. 599; *Ray v. Hill*, 3 Strob. L. (S. C.) 297, 49 Am. Dec. 647; *Neil v. Neil*, 1 Leigh (Va.) 6, 23.

⁹³ *Mealey's Will*, 11 Phila. (Pa.) 161.

Compare: *Combs' Appeal*, 105 Pa. St. 155.

⁹⁴ *In re Axford*, 1 Sw. & Tr. 540; *Fincham v. Edwards*, 3 Curt. 63; *Martin v. Mitchell*, 28 Ga. 382; *Wampler v. Wampler*, 9 Md. 540; *Day v. Day*, 3 N. J. Eq. 549; *Hess' Appeal*, 43 Pa. St. 73, 82 Am. Dec. 551.

same time.⁹⁵ The Statute of Wills of 1 Victoria, ch. 26, sec. 9, requires that his "signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator." The requirement of the joint presence of the witnesses goes only to the time of the testator's signing or acknowledging. Under this statute the testator must sign or acknowledge before all of the witnesses present at the same time;⁹⁶ but the witnesses, although they must subscribe their names in the presence of the testator, are not required to sign in the presence of each other.⁹⁷

§ 505. The Same Subject: When Demanded by Statute.

In some of the states it is required by statute that the witnesses to a will must sign the same in the presence of each other, and this requirement, when demanded, like all other formalities, must be complied with or the will must be declared invalid.⁹⁸ In the absence of a stat-

⁹⁵ Anon., 2 Chan. Cas. 109; Cook v. Parsons, Prec. in Ch. 184; Gryle v. Gryle, 2 Atk. 176; Jones v. Lake, cited in 2 Atk. 176, n.; Grayson v. Atkinson, 2 Ves. Sen. 454; Jauncey v. Thorne, 2 Barb. Ch. (N. Y.) 40, 45 Am. Dec. 424.

Where the testator signed and acknowledged his signature in the presence of one witness who subscribed his name at that time, and later acknowledged his signature to a second witness, who then subscribed his name as such, the first witness being present, the attestation and subscription were

held good. — Green v. Crain, 12 Grat. (Va.) 252.

⁹⁶ In re Allen, 2 Curt. Ecc. 331; In re Simmonds, 3 Curt. Ecc. 79; Moore v. King, 3 Curt. Ecc. 243.

⁹⁷ In re Webb, Dea. & Sw. 1; Faulds v. Jackson, 6 Notes of Cas. Supp. 1.

⁹⁸ Under such a statute, where three witnesses were required, a will signed at one time by two witnesses only can not have life imparted to it by a codicil subscribed by two witnesses, one of whom is different from the witnesses to the will itself. — Dunlap

ute requiring it, the witnesses need not sign their names in the presence of each other.⁹⁹ In a case, however, just decided in California, under the statute of that state which does not in terms require that the witnesses subscribe their names in the presence of each other,¹ it was

v. Dunlap, 4 Desaus. Eq. (S. C.) 305.

Compare: *Lea v. Libb*, Carth. 35; s. c., 3 Salk. 395.

But in jurisdictions where the statute does not require all the witnesses to be present at the same time, evidence of intention that the attestation of the codicil should apply to the will also is admissible and, if such an intention was established, the number of the witnesses might thus be completed.—*Bond v. Seawell*, 3 Burr. 1775.

⁹⁹ *Notes v. Doyle*, 32 App. D. C. 413; *Hoffman v. Hoffman*, 26 Ala. 535; *Moore v. Spier*, 80 Ala. 129, 130; *Rogers v. Diamond*, 13 Ark. 474; *Gaylor's Appeal*, 43 Conn. 82; *In re Lane's Appeal*, 57 Conn. 182, 14 Am. St. Rep. 94, 4 L. R. A. 45, 17 Atl. 926; *Webb v. Fleming*, 30 Ga. 808, 76 Am. Dec. 675; *Flinn v. Owen*, 58 Ill. 111; *Johnson v. Johnson*, 106 Ind. 475, 55 Am. Rep. 762, 7 N. E. 201; *Matter of Hull*, 117 Iowa 738, 89 N. W. 979; *Dewey v. Dewey*, 1 Metc. (Mass.) 349, 35 Am. Dec. 367; *Chase v. Kittredge*, 11 Allen (Mass.) 49, 87 Am. Dec. 687; *Fleming v. Morrison*, 187 Mass. 120, 105 Am. St. Rep. 386, 72 N. E. 499; *Cravens v. Faulconer*, 28 Mo. 19; *Welch v.*

Adams, 63 N. H. 344, 56 Am. Rep. 521, 1 Atl. 1; *Conselyea v. Walker* (In re *Bogert's Will*), 4 Civ. Proc. Rep. 441, 2 Demarest (N. Y.) 117, 67 How. Pr. 113; *Hoysradt v. Kingman*, 22 N. Y. 372; *Willis v. Mott*, 36 N. Y. 486; *In re Engler's Will*, 56 Misc. Rep. 218, 107 N. Y. Supp. 222; *Watson v. Hinson*, 162 N. C. 72, Ann. Cas. 1915A, 870, 77 S. E. 1089; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; *Blanchard's Heirs v. Blanchard's Heirs*, 32 Vt. 62; *Parramore v. Taylor*, 11 Grat. (Va.) 220; *In re Smith's Will*, 52 Wis. 543, 38 Am. Rep. 756, 8 N. W. 616, 9 N. W. 665.

Compare: *Casement v. Fulton*, 5 Moore P. C. C. 130; *Dack v. Dack*, 19 Hun (N. Y.) 630.

¹ Cal. Civ. Code, § 1276, requires, as to a will other than a holographic will, in part, as follows: ". . . 2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them . . . ; 3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and 4. There must be two attesting witnesses, each of whom must sign the same as a

held by a divided court that a will attested and subscribed by one witness in the forenoon and by another in the afternoon, the testatrix subscribing her name before the first and acknowledging her signature before the second witness, was invalid since the witnesses did not sign their names in the presence of each other.²

§ 506. Attestation Clause Not Essential to the Validity of the Will.

An attestation clause appended to a will is useful as proof, as will be hereafter shown, that the will was duly executed and that all formalities were complied with,³ but it is no part of the execution of a will and is not essential to its validity.⁴ The attestation clause may consist of the single word "witness,"⁵ or "attest,"⁶ or the witnesses may simply sign their names without any additional writing.⁷ If the attestation clause is appended, it need not be on the same sheet of paper as the will if the sheets are so held together as to make one instru-

witness, at the end of the will, at the testator's request and in his presence."

² In re Emart's Estate, (Cal.) 165 Pac. 707.

³ See, ante, § 40, as to date and attestation clause.

⁴ Roberts v. Phillips, 4 El. & Bl. 450; Bryan v. White, 5 Eng. L. & Eq. 579; Schofield v. Thomas, 236 Ill. 417, 86 N. E. 122; Matter of Hull, 117 Iowa 738, 89 N. W. 979; Nixon v. Snellbaker, 155 Iowa 390, 136 N. W. 223; Ela v. Edwards, 16 Gray (Mass.) 91, 97; Avaro v. Avaro, 235 Mo. 424, 138 S. W. 500; Monroe v. Huddart

(In re Diener's Estate), 79 Neb. 569, 14 L. R. A. (N. S.) 259, 113 N. W. 149; Taylor v. Brodhead, 5 Redf. (N. Y.) 624; In re Sizer's Will, 129 App. Div. 7, 113 N. Y. Supp. 210; In re De Hart's Will, 67 Misc. Rep. 13, 122 N. Y. Supp. 220.

⁵ Roberts v. Phillips, 30 Eng. L. & Eq. 147; Osborn v. Cook, 11 Cush. (Mass.) 532, 59 Am. Dec. 155; Murphy v. Murphy, 24 Mo. 526.

⁶ Fatheree v. Lawrence, 33 Miss. 585, 622.

⁷ Bryan v. White, 5 Eng. L. & Eq. 579.

ment.⁸ A misnomer of the testator in the attestation clause will not affect the validity of the will.⁹

§ 507. Attestation Clause Is Prima Facie Evidence of Facts Recited Therein.

The attestation clause is *prima facie* evidence of the facts therein recited. The presumption of the due execution of a will arises where there is an attestation clause reciting all the facts necessary to the validity of the will, and, in the absence of evidence discrediting such statements, the will should be admitted to probate.¹⁰ When a will contains an attestation clause reciting facts showing due compliance with all the statutory requirements, the mere non-recollection of a witness in regard to the circumstances of its execution will not justify a finding that the statutory requirements have been disregarded.¹¹ For example, if the witnesses fail to prove

⁸ Bolton v. Bolton, 106 Miss. 84, 64 So. 967.

In Tennessee wills of personal property need not be subscribed by witnesses.—Franklin v. Franklin, 90 Tenn. 44, 16 S. W. 557; State v. Goodman, 133 Tenn. 312, 181 S. W. 312, 318.

⁹ Monroe v. Huddart (In re Diener's Estate), 79 Neb. 569, 14 L. R. A. (N. S.) 259, 113 N. W. 149.

¹⁰ Blake v. Knight, 3 Curt. Ecc. 547; Deupree v. Deupree, 45 Ga. 415; Underwood v. Thurman, 111 Ga. 325, 36 S. E. 788; Thompson v. Owen, 174 Ill. 229, 45 L. R. A. 682, 51 N. E. 1046; Barnes v. Barnes, 66 Me. 286; Ela v. Edwards, 16 Gray (Mass.) 91; Spier

v. Spier (In re Spier's Estate), 99 Neb. 853, L. R. A. 1916E, 692, 157 N. W. 1016; Farley v. Farley, 50 N. J. Eq. 434, 26 Atl. 178; Borgert v. Bateman, (N. J.) 65 Atl. 238; In re Sizer's Will, 129 App. Div. 7, 113 N. Y. Supp. 210; Orser v. Orser, 24 N. Y. 51, 55; Jackson v. Jackson, 39 N. Y. 153; Matter of Cottrell, 95 N. Y. 329; In re Walker's Will, 67 Misc. Rep. 6, 124 N. Y. Supp. 615.

¹¹ Wright v. Sanderson, L. R. 9 Prob. Div. 149; Ela v. Edwards, 16 Gray (Mass.) 91; Rolla v. Wright, 2 Demarest (N. Y.) 482; Brinckerhoff v. Remsen, 8 Paige (N. Y.) 488, 499; s. c., Remsen v. Brinckerhoff, 26 Wend. (N. Y.) 325, 37 Am. Dec. 251; In re Kel-

that they were requested by the testator to sign the will as such but the attestation clause recites such a request, the recital supplies the defect in the testimony of the witnesses, especially where the will was executed in the presence of an attorney who signed as a witness, but being dead could not be called.¹² The effect of a statement in the attestation clause is to throw the burden of proving the contrary on the opponents of the will.¹³

§ 508. Will May Be Established Against Testimony of Attesting Witnesses.

A will may be established against the testimony of one or all the subscribing witnesses, if there be a full attestation clause and the circumstances show the strong

lum, 52 N. Y. 517; Wright's Estate, 67 How. Pr. (N. Y.) 117; Brown v. Clark, 77 N. Y. 369; Rugg v. Rugg, 83 N. Y. 592.

"When the subscribing witnesses are present at the probate and admit the genuineness of their signatures, but deny or are unable to recollect some or all of the facts which were attendant upon the execution, so that one or both of them are unable or unwilling to testify with positiveness and of their own knowledge that all the requirements of the statute were complied with, a presumption of due and proper execution will arise from the recitals of a perfect attestation clause."—Spier v. Spier (In re Spier's Estate), 99 Neb. 853, L. R. A. 1916E, 692, 157 N. W. 1016.

An attestation clause certifying to the due execution of the will

in all the respects required by statute, including publication of the will in the presence of witnesses, is, taken with proof of the signatures of the witnesses, prima facie evidence of the matters therein asserted.—Bogert v. Bateman, (N. J.) 65 Atl. 238.

If there is no proof that the will was duly acknowledged, the allegations in the attestation clause will be presumed to be true and will be accepted as proof that the will was duly acknowledged.—Will of Alpaugh, 23 N. J. Eq. 507.

See, also, Barnes v. Barnes, 66 Me. 286; Newell v. White, 29 R. I. 343, 73 Atl. 798; Allaire v. Allaire, 37 N. J. L. 312.

¹² Walsh v. Walsh, 4 Redf. (N. Y.) 165.

¹³ Wright v. Rogers, L. R. 1 P. & D. 678; Allaire v. Allaire, 37

probability of a proper execution.¹⁴ In a case in New Jersey it was decided that the attestation clause being in due form and the will appearing on its face to have been properly executed, probate would not be refused because one of the subscribing witnesses testified that the tes-

N. J. L. 312; *Tappen v. Davidson*, 27 N. J. Eq. 459; *Mundy v. Mundy*, 15 N. J. Eq. 290.

¹⁴ In *re Holgate*, 1 Sw. & Tr. 261; s. c., 5 Jur. N. S. 251; s. c., 29 L. J. Prob. 161; *Gwillam v. Gwillam*, 3 Sw. & Tr. 200; s. c., 29 L. J. Prob. 31; *Smith v. Smith*, L. R. 1 P. & D. 143; In *re Huckvale*, L. R. 1 P. & D. 375; *Chambers v. Queen's Proctor*, 2 Curt. 415; In *re Hare*, 3 Curt. 54; *Gove v. Gawen*, 3 Curt. 151; *Blake v. Knight*, 3 Curt. 547, 549; *Pennant v. Kingscote*, 3 Curt. 642; *Cooper v. Bockett*, 3 Curt. 648; *Goodtitle v. Clayton*, 4 Burr. 2224; *Bayliss v. Sayer*, 3 Notes of Cas. 22; *Lowe v. Jolliffe*, 1 Black. W. 365; *Rex v. Nueys*, 1 Black. W. 416; *Pike v. Badmering*, cited in *Rice v. Oatfield*, 2 Strange 1096, a dictum of Lord Mansfield in *Windham v. Chetwynd*, 1 Burr. 414; *Keating v. Brooks*, 4 Notes of Cas. 253; In *re Noyes*, 4 Notes of Cas. 284; In *re Attridge*, 6 Notes of Cas. 597; *Burgoyne v. Showler*, 1 Rob. Ecc. 5; *Brenchley v. Still*, 2 Rob. Ecc. 162; *Bennett v. Sharp*, 1 Jur. N. S. 456; *Cregreen v. Wiloughby*, 6 Jur. N. S. 590; *Thompson v. Hall*, 16 Jur. 1144; s. c., 2 Rob. Ecc. 426; *Farmer v. Brock*, 1 Deane & Sw. 187; s. c., 2 Jur.

N. S. 670; *Foot v. Stanton*, 1 Deane & Sw. 19; s. c., 2 Jur. N. S. 380; *Underwood v. Thurman*, 111 Ga. 325, 36 S. E. 788; *Thompson v. Owen*, 174 Ill. 229, 45 L. R. A. 682, 51 N. E. 1046; *McCurdy v. Neall*, 42 N. J. Eq. 333, 7 Atl. 566; In *re Johnson's Will*, 80 N. J. Eq. 555, 85 Atl. 254, 260; *Jauncey v. Thorne*, 2 Barb. Ch. (N. Y.) 40, 45 Am. Dec. 424; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158, 49 Am. Dec. 170; *Auburn Seminary Trustees v. Calhoun*, 25 N. Y. 422; *Tarrant v. Ware*, 25 N. Y. 425, n.; *Rugg v. Rugg*, 83 N. Y. 592; *Matter of Pepoon's Will*, 91 N. Y. 255; *O'Hagan's Will*, 73 Wis. 78, 9 Am. St. Rep. 763, 40 N. W. 649.

Compare: *Leech v. Bates*, 6 Notes of Cas. 699; *Wright v. Rogers*, L. R. 1 P. & D. 678; *Webb v. Dye*, 18 W. Va. 376.

"The law is well settled that a will may be supported against the testimony of some, or even of all of the attesting witnesses. . . . Were the law otherwise any will might be defeated by a corrupt witness."—*Newell v. White*, 29 R. I. 343, 73 Atl. 798, quoting *Will of Jenkins*, 43 Wis. 610, 612, approved in *Will of Meurer*, 44 Wis. 392, 401, 28 Am. Rep. 591.

tator did not declare the paper to be his will and he thought did not acknowledge his signature, the circumstances showing that this witness must have known that the instrument was a will, and his statements being contradicted by the testimony of the other witness and by another person who superintended the execution.¹⁵

**§ 509. Witnesses Dead, Out of State, or Can Not Remember:
Value of Attestation Clause.**

If witnesses be dead or out of the state, proof of their handwriting is sufficient evidence of a compliance with the statute,¹⁶ although of course the presumption of due execution is clearly rebutted where it is shown by competent persons that the names of the ostensible witnesses are fictitious and are in the testator's own handwriting.¹⁷ When the witnesses do not remember, the actual facts, such as signing in the presence of the testator, may be

¹⁵ *McCurdy v. Neall*, 42 N. J. Eq. 333, 7 Atl. 566.

When the attestation clause is duly filled out, it is entitled to the presumption of truth and may be supported by the evidence of one witness against that of two other such witnesses.—*Bloom v. Terwilliger*, 78 N. J. Eq. 221, 78 Atl. 742.

The New Jersey rule as to attestations is that where it is, at most, doubtful from the evidence whether the statements of the attestation clause are true, the presumption that the facts were in accordance with its recitals is not overcome.—*Tappen v. Davidson*, 27 N. J. Eq. 459.

Where three persons whose names were appended to the attestation clause all denied positively that they ever signed and two of them brought evidence to show their presence elsewhere at the time of the execution of the will, the court nevertheless, although there was a vigorous dissenting opinion, declined to order a new trial after judgment following a verdict sustaining the will.—*Newell v. White*, 29 R. I. 343, 73 Atl. 798.

¹⁶ *Chase v. Kittredge*, 11 Allen (Mass.) 49, 87 Am. Dec. 687; *Nickerson v. Buck*, 12 Cush. (Mass.) 332, 344; *Ela v. Edwards*, 16 Gray (Mass.) 91.

¹⁷ *In re Lee*, 4 Jur. N. S. 790.

established by circumstantial evidence.¹⁸ If the witnesses can not remember whether or not there was an actual acknowledgment, a declaration by one of them that it was his custom never to attest an instrument without hearing it acknowledged is good evidence for the jury;¹⁹ and it may be established by the testimony of one attesting witness in opposition to the other, the presumption being in favor of publication.²⁰ It is essential in good pleading to aver that the will was signed and published by the testator in the presence of the required number of witnesses.²¹

§ 510. The Same Subject: Although Testator Signed by Mark.

Although the testator signed by mark and both the attesting witnesses are dead at the time the will is offered for probate, the genuineness of the signatures of the witnesses being proved and the attestation clause showing that all formalities have been complied with, there being no evidence to the contrary, the attestation clause is accepted as true and the will is entitled to probate.²²

¹⁸ *Sutton v. Sutton*, 5 Har. (Del.) 459; *Pate's Admr. v. Joe*, 3 J. J. Marsh. (26 Ky.) 113, 116; *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460; *Transue v. Brown*, 31 Pa. St. 92.

¹⁹ *Hughes v. Hughes' Exr.*, 31 Ala. 519; *Pate's Admr. v. Joe*, 3 J. J. Marsh. (26 Ky.) 113; *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460.

²⁰ *Auburn Seminary Trustees v. Calhoun*, 25 N. Y. 422.

²¹ *Morehouse v. Cotheal*, 21 N. J. L. 480.

²² *In re Corcoran's Will*, 145 App. Div. 129, 129 N. Y. Supp. 165.

Although, in the case of a will executed by mark, the attestation clause, regular in other respects, may fail to contain the words "to be his last will and testament," after stating that the instrument was signed, sealed, published, and declared by the testator; if on offering the instrument for probate the attesting witnesses testify that the testator did so declare, probate should not be denied.—*Bowe v. Naughton*, (N. J. Eq.) 67 Atl. 152.

§ 511. Will Regular on Its Face Presumed to Have Been Duly Executed.

If the attesting witnesses are dead or can not be produced or their memories have failed as to the transaction either wholly or in part, when a will regular on its face is offered for probate, proof of the fact of execution begets the presumption that all statutory requirements were fulfilled, whether so stated in the attestation clause or not, unless the contrary be shown.²³ Where there is every appearance on the face of the paper that it was duly executed and the conduct of the testator showed an anxious and intelligent desire to do everything regularly, the presumption *omnia rite esse acta* is not rebutted by the evidence of the witnesses who appeared to have been nervous and confused on the occasion of the attestation, and whose recollection of what took place was evidently imperfect.²⁴ If the circumstances afford a basis for belief that the will was duly executed, probate

²³ Croft v. Pawlet, 2 Strange 1109; Hands v. James, 2 Comyns 531; In re Dickson, 6 Notes of Cas. 278; Trott v. Trott, 29 Law J. Prob. 156; s. c., 6 Jur. N. S. 760; In re Luffman, 5 Notes of Cas. 183; In re Johnson, 2 Curt. 341; In re Seagram, 3 Notes of Cas. 436; In re Mustow, 4 Notes of Cas. 289; Deupree v. Deupree, 45 Ga. 415; Barnes v. Barnes, 66 Me. 286; Eliot v. Eliot, 10 Allen (Mass.) 357; Chase v. Kittredge, 11 Allen (Mass.) 49, 87 Am. Dec. 687; Nickerson v. Buck, 12 Cush. (Mass.) 332, 344; Ela v. Edwards, 16 Gray (Mass.) 91; Fatheree v. Lawrence, 33 Miss. 585, 622; Chaf-

fee v. Baptist Missionary Convention, 10 Paige (N. Y.) 85, 40 Am. Dec. 225; Clarke v. Dunnavant, 10 Leigh (Va.) 13, 22.

²⁴ Wright v. Sanderson, L. R. 9 Prob. Div. 149.

The fact that some of the witnesses can not recall what occurred at the time of the execution of the will is not sufficient to refuse probate where there are enough circumstances and testimony aside from their's to justify the inference that the will was properly executed.—Tyler's Estate, 121 Cal. 405, 409, 53 Pac. 928; In re Johnson's Estate, 152 Cal. 778, 93 Pac. 1015; Allison v.

may be allowed against the testimony of all the attesting witnesses, or on the testimony of one as against the others.²⁵ When it appears from the evidence that the signature to a will is the genuine signature of the testator and that the attesting witnesses subscribed in his presence, a *prima facie* case is made in favor of the due execution of the will; and this *prima facie* case is not overcome by the mere fact that the subscribing witnesses testify that they failed to notice whether or not the will was signed.²⁶

§ 512. The Same Subject: Conflicting View.

On the other hand, it has been held that where there is no formal attestation clause and no affirmative evidence that at the time of attestation the decedent's name had been signed to the instrument proposed as his will, the mere fact that it had been produced to the witnesses and

Allison, 46 Ill. 61, 92 Am. Dec. 237; Cilley v. Cilley, 34 Me. 162, 164; Barnes v. Barnes, 66 Me. 286; Patton v. Hope, 37 N. J. Eq. 522, 527; Rugg v. Rugg, 83 N. Y. 592.

"When an instrument speaks for itself, and by its terms is a testamentary disposition of property, if legal proof be furnished of its execution, the law will presume that the maker signed it understandingly and that he intended it as his will."—In re Lillibridge's Estate, 221 Pa. St. 5, 128 Am. St. Rep. 723, 69 Atl. 1121.

"Both these witnesses say that their attestation was in the presence of the testator. The law will presume that it was with his

knowledge and approval."—In re Lillibridge's Estate, 221 Pa. St. 5, 128 Am. St. Rep. 723, 69 Atl. 1121.

²⁵ In re Miller's Estate, 37 Mont. 545, 97 Pac. 935; Bioren v. Nesler, 76 N. J. Eq. 574, 79 Atl. 425; In re Marley's (or Morley) Estate, 140 App. Div. 823, 125 N. Y. Supp. 886.

Burden is on person attacking a will, that has been admitted to probate, to show lack of due publication.—Smith v. Ryan, 136 Iowa 235, 112 N. W. 8.

²⁶ Thompson v. Karme, 268 Ill. 168, 108 N. E. 1001. See, also, Gould v. Chicago Theological Seminary, 189 Ill. 282, 59 N. E. 536.

that they had been requested to sign it is not in itself sufficient to justify the court in drawing the inference that it had already been signed by the deceased.²⁷ It has also been ruled that whether the attestation clause recites it as a fact or not, if the point is raised that the will was not signed in the presence of the testator, clear proof of compliance with that formality will be required.²⁸ And "if on examining all the witnesses and considering the attending circumstances, a reasonable doubt remains whether one or more of the directions of the statutes have not been omitted, the probate must be refused, although it may appear probable that the paper expresses the testator's intentions."²⁹ In a late case it was said that "If there be a reasonable doubt whether any one of the requirements of the statute has been complied with, probate must be denied"; this in a case where a will was rejected because nothing had been said by the testator to the witnesses which had any reference to his subscription of the paper.³⁰

§ 513. Due Execution a Question of Fact.

The question of the due execution of a will is one of fact to be determined by the court or jury upon the evidence presented, and if determined by a jury on con-

²⁷ *Pearson v. Pearson*, L. R. 2 P. & D. 451; *Fischer v. Popham*, L. R. 3 P. & D. 246.

Compare: *Cooper v. Bockett*, 3 Curt. 648.

Contra: *Thompson v. Karme*, 268 Ill. 168, 108 N. E. 1001.

²⁸ *Brice v. Smith*, Willes 1; *Hands v. James*, Comyns 531; *Croft v. Pawlet*, 2 Strange 1109; *Rancliff v. Parkyns*, 6 Dow 149,

202; *Doe v. Davies*, 9 Q. B. 648; *Hitch v. Wells*, 10 Beav. 84.

²⁹ *Noding v. Alliston*, 2 Eng. L. & Eq. 594; *Chaffee v. Baptist Missionary Convention*, 10 Paige (N. Y.) 85, 40 Am. Dec. 225; *Tarrant v. Ware*, 25 N. Y. 425, n. 429.

³⁰ *In re Noyes' Estate*, 40 Mont. 178, 105 Pac. 1013.

See, also, *In re Harris' Will*, 1 Tucker (N. Y.) 293.

flicting testimony it is not open to question if supported by substantial evidence.³¹ When the question of execution has been submitted to the jury, the court may not instruct the jury to find that the instrument is not entitled to probate.³²

Compare: In re Harder's Will,
1 Tucker (N. Y.) 426.

³¹ Gilbert v. Griffith, (Ky.) 120
S. W. 1104.

³² In re Gray's Estate, 88 Neb.
835, Ann. Cas. 1912B, 1037, 33
L. R. A. (N. S.) 319, 130 N. W.
746.

CHAPTER XX.

REVOCATION AND ALTERATION.

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- § 559. The same subject: As to revocation.
- § 560. The same subject: Alterations disregarded: Original will deciphered if possible.
- § 561. The same subject: When made by a stranger, or interested party.

§ 514. Statutory Regulations.

Prior to the Statute of Frauds, 29 Charles II, ch. 3, wills in England could be revoked without writing, express words only being necessary.¹ By that statute it was enacted that "no devise in writing of lands, tenements and hereditaments, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same by the testator himself, or in his presence and by his direction and consent." As to such other will, codicil or other writing which declared a revocation of a former testament, the statute required that it be "signed in the presence of three or four witnesses."² As to wills of personalty, the Statute of Frauds prescribed that neither such a will nor any clause or bequest therein should be repealed or altered by any words, or will by word of mouth only, except the same, in the lifetime of the testator, be committed to writing, be read to the testator after the writing thereof, and be allowed by him, and be proved to be so done by at least three witnesses.³

The language of the Victorian statute, as to both real and personal property, is that no will or codicil, or any part thereof, shall be revoked (not including revocation because of marriage, etc.) otherwise than by another

¹ *Cranvel v. Sanders*, Cro. Jac. 497. See, also, *Ex parte Ilchester*, 7 Ves. Jun. 348; *Richardson v. Barry*, 3 Hagg. Ecc. 249.

This same rule prevailed in Connecticut prior to the year 1821. —*Card v. Grinman*, 5 Conn. 164.

As to Pennsylvania, see *Lawson v. Morrison*, 2 Dall. (Pa.) 286, 288, 1 L. Ed. 384, 1 Am. Dec. 288.

² Statute of 29 Charles II, ch. 3, § 6.

³ Statute of 29 Charles II, ch. 3, § 22.

will or codicil, executed according to the formalities required for the execution of wills, or by some writing declaring an intention to revoke the same, executed in like manner, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.⁴ With some modifications the provisions of these statutes have been generally adopted in the United States and in its territories.^{4a} In many states it is specially provided that the enactments concerning revocation by destroying or by subsequent will are not to the exclusion of the revocation implied in law from a change in the condition and circumstances of the testator.⁵

⁴ Statute of 1 Victoria, ch. 26, § 20.

Note the omission of the word "canceling" used in the Statute of Frauds; for the effect of which, see *Stephens v. Taprell*, 2 Curt. 458.

^{4a} See synopsis of statutes, Appendix, this volume.

Thirty-three states and territories omit the words "and consent." Rhode Island, New York, Maryland, and Florida follow exactly the words of the phrase "by his direction and consent." In Delaware the canceling acts may be performed by another in the absence of the testator, if in accordance with his express direction. The statutes of Ohio, Kansas, and Nevada make the alternative "either in his presence or

by his direction," while the codes of Georgia and Iowa are silent on the point of presence, requiring simply that the cancelation be by the testator's direction. — *Stimson's Am. Stat. Law*, § 2672, A, B.

When the will is destroyed by another the fact of the destruction, with the consent or direction of the testator, must be proved by at least two witnesses in Alabama and Arkansas, and a similar provision is found in the statutes of New York, California, Oregon, Dakota, Montana and Utah. — *Stimson's Am. Stat. Law*, § 2672 C.

In Iowa, when the revocation is by cancelation, it must be witnessed in the same manner as the making of a new will. — *Iowa Code*, 1897, § 3276.

⁵ See synopsis of statutes, Appendix, this volume.

§ 515. Statutes Regarding Revocation Are Not Retroactive.

A statute regulating the revocation of wills does not extend to a will revoked before its enactment.⁶ Accordingly it has been decided that the passage of a statute to the effect that "marriage shall be deemed a revocation of a prior will" was prospective in effect, and did not apply to marriages prior to its enactment.⁷ So, also, where a statute requires the revocation of a will to be accompanied by the same formalities necessary to execution, it is sufficient if it be done with the formalities requisite to make a will at the time the will was executed.⁸

§ 516. Revocation by Parol Generally Prohibited.

The modern doctrine is that a written will can not be revoked by parol, and statutes to that effect are in force in most of the states of the Union.⁹ Nor can a will in writing be revoked by a nuncupative will, where revocation must be executed with the same formalities as are required for the will which it seeks to revoke.¹⁰ In Colorado it is enacted that no will duly executed may be

⁶ *Sherry v. Lozier*, 1 Bradf. (N. Y.) 437.

⁷ *In re Tuller's Will*, 79 Ill. 99, 22 Am. Rep. 164.

⁸ *Sherry v. Lozier*, 1 Bradf. (N. Y.) 437.

⁹ *Woodruff v. Hundley*, 127 Ala. 640, 85 Am. St. Rep. 145, 29 So. 98; *In re Olmstead's Estate* (*Olmstead v. Buss*), 122 Cal. 224, 54 Pac. 745; *Goodsell's Appeal*, 55 Conn. 171, 10 Atl. 557; *Coffee v. Coffee*, 119 Ga. 533, 46 S. E. 620; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Perjue v. Perjue*, 4

Iowa 520; *Wittman v. Goodhand*, 26 Md. 95; *Reid v. Borland*, 14 Mass. 208; *Stickney v. Hammond*, 138 Mass. 116; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Jackson v. Kniffen*, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390; *Heise v. Heise*, 31 Pa. St. 246, 249; *Kirkpatrick v. Jenkins*, 96 Tenn. 85, 33 S. W. 819; *Ladd's Will*, 60 Wis. 187, 50 Am. Rep. 355, 18 N. W. 734.

See, ante, § 188.

¹⁰ *McCune's Devisees v. House*, 8 Ohio 144, 31 Am. Dec. 438; *Brook v. Chappell*, 34 Wis. 405.

annulled by spoken words. In Florida, a will of personal property may be revoked by parol, if the words be committed to writing in the testator's lifetime and be read to him and allowed by him, and these facts be proven by three witnesses. In Tennessee no will can be revoked or altered by subsequent spoken words, unless they be reduced to writing and read over to the testator and approved by him, and these circumstances be proven by two competent witnesses. Substantially similar provisions are made in New Jersey, with the additional requirement of one more witness. But in New Jersey, it is only wills of personalty that may be thus revoked by parol.¹¹

§ 517. Right and Meaning of Revocation.

The term "revocation," as applied to wills, means the act, coupled with the intent, by which the maker causes the instrument to lose all force or effect. Wills are ambulatory, effective only at the death of the testator, and in their very nature revocable.¹² Wherever wills can be made, they can be revoked, although various jurisdictions prescribe different formalities on the subject.¹³

§ 518. Mental Capacity Necessary: Act and Intent Must Concur.

In order that any act of revocation may be effectual, the testator must at the time of performing it be in pos-

¹¹ See synopsis of statutes, Appendix, this volume.

¹² *Verdier v. Verdier*, 8 Rich. L. (S. C.) 135; *Dicks v. Cassels*, 100 S. C. 341, 84 S. E. 878. See, ante, § 80.

¹³ *Ennis v. Smith*, 14 How. (55 U. S.) 400, 419, 14 L. Ed. 472.

See, ante, §§ 80-90, as to revocation of joint, mutual or reciprocal wills.

See, ante, §§ 119-126, as to revocation of duplicate wills.

session of his faculties and capable of making a will. The same degree of mental capacity is required to revoke a will as to make one.¹⁴ There must also exist the intention to revoke; this is an essential element. The act of revocation alone is insufficient; there must be a concurrence of act and intent.¹⁵ A will executed when the testator is under undue influence is ineffectual as an act of revocation.¹⁶ When a testator, not permanently insane at the time, tears a will while laboring under an excitement which incapacitates him from forming or having a reasonable or intelligent intention of revocation, his act will not revoke the instrument.¹⁷ The destruction of the will by the testator in a fit of temporary insanity is not a revocation.¹⁸ If an insane testator tear his will, it must be shown affirmatively that he did so during a lucid interval, or it will not effect a revocation.¹⁹ If torn under misapprehension and the will is thereafter pasted together, it will be admitted to probate.²⁰

¹⁴ *Rhodes v. Vinson*, 9 Gill (Md.) 169, 52 Am. Dec. 685; *Rich v. Gilkey*, 73 Me. 595; *Smith v. Wait*, 4 Barb. (N. Y.) 28; *Ford v. Ford*, 7 Humph. (Tenn.) 92.

See, ante, ch. 14, §§ 326-355, as to mental capacity necessary to make a will.

¹⁵ *Throckmorton v. Holt*, 180 U. S. 552, 586, 45 L. Ed. 663, 21 Sup. Ct. 474; *Burton v. Wylde*, 261 Ill. 397, 103 N. E. 976; *Smith v. Runkle*, (N. J.) 97 Atl. 296, affirmed, (N. J.) 98 Atl. 1086; *Godley v. Smith*, (N. J.) 98 Atl. 1085; *Smith v. Schoefield*, (N. J.) 98 Atl. 1087.

¹⁶ *O'Neill v. Farr*, 1 Rich. L. (S. C.) 80.

¹⁷ *Forman's Will*, 54 Barb. (N. Y.) 274; s. c., 1 Tuck. (N. Y.) 205.

See, also, *Collagan v. Burns*, 57 Me. 449; *Clark's Will*, 1 Tuck. (N. Y.) 445.

¹⁸ *Scruby v. Fordham*, 1 Adams Ecc. 74; *Brunt v. Brunt*, L. R. 3 P. & D. 37; *In re Downer*, 18 Jur. 66; *In re Shaw*, 1 Curt. 905; *Borlase v. Borlase*, 4 Notes of Cas. 106, 139; *In re Lang*, 65 Cal. 19, 2 Pac. 491; *Forbing v. Weber*, 99 Ind. 588.

¹⁹ *Harris v. Berrall*, 1 Sw. & Tr. 153; *Sprigge v. Sprigge*, L. R. 1 P. & D. 608.

²⁰ *Goods of Thornton*, L. R. 14 Prob. Div. 82.

§ 519. What Mutilation Constitutes Revocation: Surreptitious Preservation of Fragments.

A common method of revoking wills is by obliteration, mutilation, or cancellation.²¹ The burning, tearing, cancelling, or otherwise destroying of any material part, such as the name of a devisee,²² or the signature of the testator,²³ or of the attesting witnesses,²⁴ will effect the revocation of a will. Where a will is signed several times, the last signature being the efficient one, an erasure of it works a revocation.²⁵ The phrase "otherwise destroying" embraces any act similar in nature to burning and tearing, by which the substance of the will is destroyed, or its contents effaced.²⁶ Tearing has been held to include cutting.²⁷ The slightest mutilation or burning even of an

²¹ *Smith v. Runkle*, (N. J. Pre-rog.) 97 Atl. 296, affirmed, (N. J.) 98 Atl. 1086; *Godley v. Smith*, (N. J.) 98 Atl. 1085; *Smith v. Schoefield*, (N. J.) 98 Atl. 1087.

²² *Mence v. Mence*, 18 Ves. Jun. 348, 350. See, also, *Martins v. Gardiner*, 8 Sim. 73.

²³ *Hobbs v. Knight*, 1 Curt. 768; *In re Gullan*, 1 Sw. & Tr. 23; s. c., 27 L. J. Prob. 15; *In re Lewis*, 1 Sw. & Tr. 31; s. c., 27 L. J. Prob. 31; *Williams v. Jones*, 7 Notes of Cas. 106; *In re Simpson*, 5 Jur. N. S. 1366; *Bell v. Fothergill*, L. R. 2 P. & D. 148; *Youse v. Forman*, 5 Bush. (68 Ky.) 337.

²⁴ *In re Dallow* (*Evans v. Dallow*), 31 L. J. Prob. 128; *Birkhead v. Bowdoin*, 2 Notes of Cas. 66; *Abraham v. Joseph*, 5 Jur. N. S. 179. See, also, *In re James*, 7 Jur. N. S. 52.

²⁵ *In re Gullan*, 1 Sw. & Tr. 23; s. c., 27 L. J. Prob. 15; s. c., 4 Jur. N. S. 196; *Gullan v. Grove*, 26 Beav. 64. See, also, *Christmas v. Whinyates*, 3 Sw. & Tr. 81, 32 L. J. Prob. 73.

²⁶ *Hobbs v. Knight*, 1 Curt. 768, 779; *In re Beavan*, 2 Curt. 369; *In re Horsford*, L. R. 3 P. & D. 211; *In re Dyer*, 5 Jur. 1016; *In re Fary*, 15 Jur. 1114; *In re Rose*, 4 Notes of Cas. 101; *In re Brewster*, 29 L. J. Prob. 69; s. c., 6 Jur. N. S. 56.

²⁷ *Hobbs v. Knight*, 1 Curt. 768; *In re Cooke*, 5 Notes of Cas. 390; *Clarke v. Scripps*, 16 Jur. 783; s. c., 2 Rob. Ecc. 563; *Burton v. Wylde*, 261 Ill. 397, 103 N. E. 976.

But "otherwise destroying" has been held not to embrace "canceling."—*Stephens v. Taprell*, 2 Curt. 458.

unnecessary part, accompanied by other evidence of an intention to revoke, has been considered sufficient.²⁸ Accordingly, it has been held that although a seal is not required, if a testator tears it off with the intent to revoke, it will amount to a revocation of the will.²⁹ But such slight mutilation in itself is not sufficient to work a revocation unless there is other evidence to show the intent to revoke; and if such evidence is lacking and the instrument as a whole has not been affected by the mutilation, the will stands.³⁰ If a portion only was designedly

²⁸ *Dan v. Brown*, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395; *Jackson v. Betts*, 6 Cow. (N. Y.) 377; *Johnson v. Brailsford*, 2 Nott & McC. (S. C.) 272, 10 Am. Dec. 601; *Slaughter v. Stephens*, 81 Ala. 418, 2 So. 145; *Woodruff v. Hundley*, 127 Ala. 640, 85 Am. St. Rep. 145, 29 So. 98; *Burton v. Wylde*, 261 Ill. 397, 103 N. E. 976; *Avery v. Pixley*, 4 Mass. 460; *Lovell v. Quitman*, 88 N. Y. 377, 42 Am. Rep. 254.

Under the New York statute a will is not partially revoked by burning, tearing, canceling, obliterating or destroying a portion of it.—*In re Hildenbrand's Will*, 87 Misc. Rep. 471, 150 N. Y. Supp. 1067; *In re Kent's Will*, 89 Misc. Rep. 16, 152 N. Y. Supp. 557.

A will may be revoked by marks made upon it, if they are made with the intention to cancel it.—*Pyle v. Murphy*, 180 Ill. App. 13.

²⁹ *Price v. Powell*, 3 Hurl. & N. 341; *Williams v. Tyley*, John. 530; *Avery v. Pixley*, 4 Mass. 460.

In New York it has been ruled that a partial obliteration will not effect a revocation under a statute requiring that the will be "burnt, torn, canceled, obliterated, or destroyed."—*Lovell v. Quitman*, 88 N. Y. 377, 42 Am. Rep. 254; s. c., 25 Hun (N. Y.) 537.

³⁰ *Hobbs v. Knight*, 1 Curt. 768; *Bell v. Fothergill*, L. R. 2 P. & D. 148; *In re Lewis*, 1 Sw. & Tr. 31, 27 L. J. Prob. 31; *Giles v. Warren*, L. R. 2 P. & D. 401; *Brown's Will*, 1 B. Mon. (Ky.) 56, 35 Am. Dec. 174; *Avery v. Pixley*, 4 Mass. 460; *Lovell v. Quitman*, 88 N. Y. 377, 42 Am. Rep. 254.

In order to accomplish the revocation of a will by total or partial destruction, it is necessary that the act and intention to revoke concur.—*Burton v. Wylde*, 261 Ill. 397, 103 N. E. 976; *In re Sheaffer's Estate*, 240 Pa. St. 83, 87 Atl. 577.

Revocation of a will by cancellation, obliteration or destruction requires the concurrence of both the

destroyed, it may work a revocation of that part only.³¹ But the mere obliteration of words on the envelope or covering of a will is not sufficient to work a revocation.³²

Surreptitious preservation of the fragments of a will which the testator mutilated in his attempt to destroy the same, although pasted together or in such a condition as to be perfectly legible, will not give the instrument validity as a will;³³ and the same rule applies where revocation by destruction is fraudulently prevented.³⁴

§ 520. Lines Drawn Across the Will.

Drawing lines across a will has been said to be an equivocal act that might be explained by circumstances.³⁵ For example, cancellation by pencil is presumed to be deliberative only, and to be effective must be shown to have been intended to be final.³⁶ But if it be done with the *animus revocandi*, pencil lines drawn by the testator across his signature, although leaving the name still legible, have been held sufficient under a statute providing mutilation as one of the modes of revocation.³⁷ Where all but four of some twenty legacies, the clause appointing executors, and the testator's name were cancelled by pen marks, and in the margin were several additions in the testator's handwriting supposed to be designed for a new will, it was decided that the will was revoked.³⁸ If,

physical act and the intention to revoke. — Wellborn's Will, 165 N. C. 636, 81 S. E. 1023.

31 Clarke v. Scripps, 2 Rob. Ecc. 563.

32 Grantley v. Garthwaite, 2 Russ. 90.

33 White v. Casten, 46 N. C. 197, 59 Am. Dec. 585; Sweet v. Sweet, 1 Redf. (N. Y.) 451.

34 Doe d. Reed v. Harris, 6 Ad. & El. 209.

35 Bethell v. Moore, 19 N. C. 311.

36 In re Hall, L. R. 2 P. & D. 256; Mence v. Mence, 18 Ves. Jun. 348; Francis v. Grover, 5 Hare 39.

37 Woodfill v. Patton, 76 Ind. 575, 40 Am. Rep. 269.

38 Müh's Succession, 35 La. Ann. 394, 48 Am. Rep. 242.

however, the statute regarding revocation requires a cancellation to be witnessed in the same manner as a will, a scroll drawn through the testator's signature does not cancel the will, and the evidence that the testator declared that he had revoked his will, is not admissible.³⁹

§ 521. Burning: Intention to Burn Insufficient.

Where the maker of a will threw it upon the fire with the intent to revoke, and it was burned through in three places, this was considered a revocation, although the writing remained intact, and although it was rescued and preserved without the knowledge of the testator.⁴⁰ If the testator intends to revoke his will, but through mistake or the fraud of others he burns the wrong document under the belief that it is his will, and he never discovers the mistake, his act amounts to a revocation.⁴¹ It is held that there must be some burning, although slight, or a strong intention to burn would be insufficient;⁴² but where the will was crumpled and partially torn, then thrown on the fire but fell off and was surreptitiously preserved, the document was denied probate.⁴³

§ 522. Destruction by Third Person: Direction of Testator.

A destruction of a will by another at the testator's direction must be made in his presence, both under the act of 1 Victoria, ch. 26, and the Statute of Frauds. Therefore, the testator can not revoke his will by authorizing

³⁹ Gay v. Gay, 60 Iowa 415, 46 Am. Rep. 78, 14 N. W. 238.

⁴⁰ White v. Casten, 46 N. C. 197, 59 Am. Dec. 585.

⁴¹ Smiley v. Gambill, 2 Head (Tenn.) 164.

⁴² Doe d. Reed v. Harris, 6 Ad. & El. 209.

⁴³ Bibb d. Mole v. Thomas, 2 Wm. Bl. 1043. This case was distinguished in Doe d. Reed v. Harris, 6 Ad. & El. 209.

any one to destroy it after his death;⁴⁴ and, if so destroyed, its contents may be proven *aliunde*.⁴⁵ Nor is a will revoked by the mere direction of the testator to a third person to destroy it, notwithstanding such person informs the testator that the will was so destroyed. The belief of the testator does not amount to a revocation, even though it was induced by fraud.⁴⁶ But where the custodian of a will refused to comply with the testator's direction to burn his will, and the latter afterward acquiesced, there was no revocation.⁴⁷ A will fraudulently destroyed by a third person remains valid and, upon proof of its contents, may be admitted to probate.⁴⁸ But no fraud can be committed by any person assisting to destroy a will by the express direction of a testator in the full possession of his faculties; and it is not necessary that the acts of destruction should be performed in the presence of witnesses, the testator's presence alone being sufficient.⁴⁹

However, cancellations ineffectual to revoke the will under the statute of 1 Victoria, ch. 26, may still have an effect upon its construction.⁵⁰

⁴⁴ Stockwell v. Ritherdon, 6 Notes of Cas. 409, 414.

⁴⁵ In re North, 6 Jur. 564.

⁴⁶ Doe d. Reed v. Harris, 6 Ad. & El. 209; Estate of Silva, 169 Cal. 116, 145 Pac. 1015; Trice v. Shipton, 113 Ky. 102, 101 Am. St. Rep. 351, 67 S. W. 377; Mundy v. Mundy, 15 N. J. Eq. 290; Tynan v. Paschal, 27 Tex. 286, 302, 84 Am. Dec. 619; Boyd v. Cook, 3 Leigh (Va.) 32.

⁴⁷ Giles' Heirs v. Giles' Exrs., 1 N. C. 377, Cam. & N. Conf. (N. C.) 174.

⁴⁸ Voorhis v. Voorhis, 50 Barb. (N. Y.) 119.

⁴⁹ Timon v. Claffy, 45 Barb. (N. Y.) 438.

⁵⁰ Twining v. Powell, 2 Colles C. C. 262; Gann v. Gregory, 3 De Gex M. & G. 777; Shea v. Boschetti, 18 Beav. 321, 18 Jur. 614.

§ 523. Partial Revocation: Authorized Under the Statutes of Some Jurisdictions.

The Statute of Frauds prescribed the formalities of revoking devises of real property, or "any clause thereof."⁵¹ Under this act partial revocation was permissible.⁵² Section 20 of the statute of 1 Victoria, ch. 26, likewise provides for the revocation of a will or codicil, "or any part thereof." Wherever the statutes are similarly worded, any clause in a will may be revoked by cancellation, obliteration, and the like, without affecting the validity of the rest of the instrument, if it appear that the testator did not thereby intend to destroy the whole.⁵³ Thus a fee simple has been reduced to a life estate by the testator cancelling the words "his heirs and assigns forever."⁵⁴ Ink lines drawn by the testator through each word of a clause, and also diagonally through the whole clause, were held to cancel that part of the will; and, omitting the canceled part, the instrument was entitled to probate.⁵⁵ Where memoranda appeared in the margin of the will, opposite canceled legacies, which were signed by the testatrix with her name

⁵¹ Statute of 29 Charles II, ch. 3, § 6.

⁵² *Martins v. Gardiner*, 8 Sim. 73; *Francis v. Grover*, 5 Hare 39; *Mence v. Mence*, 18 Ves. Jun. 348, 350; *Roberts v. Round*, 3 Hagg. Ecc. 548; *Short v. Smith*, 4 East 419; *Goods of Woodward*, L. R. 2 P. & D. 206.

⁵³ *Wolf v. Bollinger*, 62 Ill. 368, 372; *Hubbard v. Hubbard*, 198 Ill. 621, 64 N. E. 1038; *Tudor v. Tudor*, 17 B. Mon. (56 Ky.) 383; *Eschbach v. Collins*, 61 Md. 478, 48 Am. Rep. 123; *Varnon v. Var-*

non, 67 Mo. App. 534, 537; *Means v. Moore*, Harper's L. (S. C.) 314.

Contra: *Quinn v. Quinn*, 1 Thomp. & C. (N. Y.) 437.

⁵⁴ *Swinton v. Bailey*, 1 Ecc. Div. 110; affirmed, in D. P. 48 L. J. (H. L.) Ecc. 57; *Short d. Gastrell v. Smith*, 4 East 419; *Larkins v. Larkins*, 3 Bos. & P. 16; *Sutton v. Sutton*, 2 Cowp. 812; *In re Lambert*, 1 Notes of Cas. 131; *In re Woodward*, L. R. 2 P. & D. 206.

⁵⁵ *Chinmark's Estate*, Myrick's Prob. (Cal.) 128.

in one case and her initials in another, and which stated that she wished to "erase" those parts, the will being found among her valuable papers a few hours after her death, the legacies were considered effectually revoked.⁵⁶

Partial revocation is not allowed under some statutes, the formalities of revocation applying to the entire instrument,⁵⁷ but other jurisdictions, even under such statutes, hold partial revocation to be authorized.⁵⁸

§ 524. The Same Subject: Evidence of Intention May Be Shown.

Whether a testator's tearing the paper on which his will is written operates as a revocation of the whole will or codicil, or of a single devise only, is a question of intention, to be gathered from all the circumstances.⁵⁹ Thus, where the testator tore his name from the foot of a codicil, and in so doing carried away some words in the body of the will on the reverse side, it was held that the codicil only was revoked.⁶⁰ And where the testator cut his signature from his will, evidence was admitted to show that he intended to include in the revocation a codicil written at the foot of the will.⁶¹

⁵⁶ In re Kirkpatrick's Will, 22 N. J. Eq. 463.

Compare: Gugel v. Vollmer, 1 Demarest (N. Y.) 484.

⁵⁷ Law v. Law, 83 Ala. 432, 3 So. 752; Lovell v. Quitman, 88 N. Y. 377, 42 Am. Rep. 254; Quinn v. Quinn, 1 Thomp. & C. (N. Y.) 437; Matter of Alger's Will, 38 Misc. Rep. (N. Y.) 143, 77 N. Y. Supp. 166.

⁵⁸ Miles' Appeal, 68 Conn. 237, 36 L. R. A. 176, 36 Atl. 39; Townshend v. Howard, 86 Me. 285, 29

Atl. 1077; Bigelow v. Gillott, 123 Mass. 102, 25 Am. Rep. 32.

⁵⁹ In re Cook's Will, 5 Clark (Pa.) 1.

Where a codicil specially revokes one portion of the will, the implied intention is that the rest of the will shall stand.—Bloodgood v. Lewis, 209 N. Y. 95, 102 N. E. 610.

⁶⁰ In re Cook's Will, 5 Clark (Pa.) 1.

⁶¹ In re Bleckley, L. R. 8 Prob. Div. 169.

The effect of a partial revocation is to throw the property disposed of by the canceled item in the general residue, unless there be evidence of a contrary intention.⁶²

§ 525. Revocation by Will or Other Writing.

A will may be revoked by the execution of an instrument of revocation or cancellation; and this instrument may be a new will containing an express clause of revocation or an instrument of revocation alone which, under some statutes, need not be testamentary in character.⁶³ The statute requires that such will or other writing revoking a former will or codicil must be executed with all the formalities required for the execution of wills. A former will, however, is not revoked by a second will which expressly affirms the first will; nor will the revocation of the second will, which affirms the validity of the first, operate to revoke the first will.⁶⁴ Even an express revocation clause is not always imperative. Its effect depends upon the intention of the testator as gathered from both instruments.⁶⁵ For example, it may be shown that a revocation clause was not intended to apply to a will made under a power of appointment.⁶⁶

⁶² *Bigelow v. Gillott*, 123 Mass. 102, 25 Am. Rep. 32.

⁶³ *Brown v. Brown*, 8 El. & Bl. 876; *Chestnut v. Capey*, 45 Okla. 754, 146 Pac. 589; *Stevens v. Hope*, 52 Mich. 65, 17 N. W. 698; *Cheever v. North*, 106 Mich. 390, 58 Am. St. Rep. 499, 37 L. R. A. 561, 64 N. W. 455; *In re Cunningham*, 38 Minn. 169, 8 Am. St. Rep. 650, 36 N. W. 269; *Marsh v. Marsh*, 48 N. C. 77, 64 Am. Dec. 598; *Matter*

of Barnes' Will, 70 App. Div. 523, 75 N. Y. Supp. 373.

⁶⁴ *In re Danklefsen's Will*, 171 App. Div. 339, 157 N. Y. Supp. 119.

⁶⁵ *Hollingshead v. Sturgis*, 21 La. Ann. 450; *Van Wert v. Benedict*, 1 Bradf. (N. Y.) 114.

⁶⁶ *In re Meredith*, 29 L. J. Prob. 155; *In re Joys*, 4 Sw. & Tr. 214, 30 L. J. Prob. 169; *In re Merritt*, 1 Sw. & Tr. 112, 4 Jur. (N. S.) 1192; *Hughes v. Turner*, 4 Hagg.

§ 526. Revocation by Later Inconsistent Will.

There need be no express words of revocation in a will in order to annul a previously executed testamentary disposition, if it devise or bequeath the same property to other beneficiaries, or make other inconsistent provisions.⁶⁷ The last will of a testator, being complete in itself and adequate to the disposition of the estate, is a revocation of all anterior wills, although no words of

Ecc. 52; *Denny v. Barton*, 2 Phil. 575. See, also, *In re Eustace*, L. R. 3 P. & D. 183.

⁶⁷ *In re Hough's Estate*, 15 Jur. 943; *Evans v. Evans*, 17 Sim. 86, 107; *Fownes-Luttrell v. Clarke*, W. N., (1876) 168, 249; *Hardwicke v. Douglas*, 7 Clark & F. 795, reversing *Douglas v. Leake*, 5 Law J. Ch. 25; *Kermode v. Macdonald*, L. R. 1 Eq. 457; *Henfrey v. Henfrey*, 2 Curt. 468; *Cottrell v. Cottrell*, L. R. 2 P. & D. 397; *Clarke v. Ransom*, 50 Cal. 595; *Ludlum v. Otis*, 15 Hun (N. Y.) 410; *Burden's Estate*, 11 Phila. (Pa.) 130; *Estate of Gensimore*, 246 Pa. St. 216, 92 Atl. 134; *Reese v. Probate Court of Newport*, 9 R. I. 434.

The Louisiana rule is that a later will does not necessarily revoke a prior will, but that both are entitled to probate, unless the effect of the later is to revoke the former.—*Succession of Lefort*, 139 La. 51, 71 So. 215.

A will may be effectively revoked by an inconsistent disposition of previously devised property.—*Colvin v. Warford*, 20 Md.

357; *Johns Hopkins University v. Pinckney*, 55 Md. 365; *Joynes v. Hamilton*, 98 Md. 665, 57 Atl. 25; *Gardner v. McNeal*, 117 Md. 27, Ann. Cas. 1914A, 119, 40 L. R. A. (N. S.) 553, 82 Atl. 988.

If it can be ascertained from the face of a later will that it is intended as the last will of the testator, it will revoke prior wills, although there are no express words of revocation.—*Aldrich v. Aldrich*, 215 Mass. 164, 102 N. E. 487.

Where the later will devises all the entire estate and so renders an earlier will nugatory, the effect of the later will is to revoke the prior.—*In re Sheldon's Estate*, 158 App. Div. 843, 144 N. Y. Supp. 94; *In re McMullen's Will*, 95 Misc. Rep. 404, 159 N. Y. Supp. 98; *Estate of Burke*, 66 Ore. 252, 134 Pac. 11.

The fact that a subsequent will does not dispose of the entire estate, will not prevent its revocation of a prior will where there is an express clause of revocation in the later will.—*Estate of Ely*, 74 Ore. 561, 146 Pac. 89.

revocation are used, and although the disposition of a large share of the property is by way of residuary devise. The legacies in the last will are considered substitutional and not cumulative to those named in the first.⁶⁸ A codicil may by implication revoke the posterior of two wills by expressly referring to the prior, and recognizing it as the actual will of the testator,⁶⁹ unless the earlier will has been destroyed by the testator.⁷⁰ But a will is not revoked by a subsequent instrument which neither revokes it in express terms nor by implication;⁷¹ and where a later will is inconsistent in some of the pro-

⁶⁸ *In re Fisher*, 4 Wis. 254, 65 Am. Dec. 309. See, also, *Simmons v. Simmons*, 26 Barb. (N. Y.) 68.

⁶⁹ *Walpole v. Orford*, 3 Ves. Jur. 402; s. c., *Walpole v. Cholmondeley*, 7 Term Rep. 138; *Payne v. Trappes*, 11 Jur. 854; s. c., 1 Rob. Ecc. 583; *In re Chapman*, 8 Jur. 902; s. c., 1 Rob. Ecc. 1; *Crosbie v. Macdoul*, 4 Ves. Jun. 610.

A codicil to a will revokes the will to the extent necessary to give effect to the codicil.—*McKinstry v. Price*, 263 Ill. 626, 105 N. E. 750.

A codicil which provides for an additional legacy to come out of the residuary estate modifies and revokes the will to that extent.—*Osburn v. Rochester Trust and Safe Deposit Co.*, 209 N. Y. 54, Ann. Cas. 1915A, 101, 46 L. R. A. (N. S.) 983, 102 N. E. 571.

Where a codicil revokes a portion of the will in express terms,

and gives a reason for the revocation, the revocation will stand, notwithstanding the fact that the purpose for which the revocation is made may fail; thus where the testator has revoked a residuary bequest, intending to give such bequest to charity, and the charity bequest fails because of the testator's death within thirty days of the execution of the codicil, the codicil nevertheless stood as to the revocation of the residuary bequest.—*In re Melville's Estate*, 245 Pa. 318, 91 Atl. 679.

⁷⁰ *Hale v. Tokelove*, 2 Rob. Ecc. 318; *Rogers v. Goodenough*, 2 Sw. & Tr. 342; *Newton v. Newton*, 12 Ir. Ch. 118.

⁷¹ *Inglefield v. Coghlan*, 2 Colles C. C. 247; *Lemage v. Goodban*, L. R. 1 P. & D. 57; *In re De la Saussaye*, L. R. 3 P. & D. 42; *In re Petchell*, L. R. 3 P. & D. 153; *Richards v. Queen's Proctor*, 18 Jur. 540; *Cutto v. Gilbert*, 9 Moore P. C. C. 131; *Freeman v. Freeman*,

visions, and not as to others, it operates as a revocation only so far as the inconsistency extends.⁷² In some of the states it is provided by statute that a subsequent inconsistent will implies a revocation only so far as the inconsistency extends; and any portion of the first which can stand without conflicting with the last remains unrevoked.

Where the existing law distinguishes between the formalities requisite for a bequest of personalty and a devise of realty, a will disposing of both classes of property may be revoked *pro tanto* by another instrument passing the personalty only, and executed only with such formalities as are necessary for a valid will of personal property.⁷³

After one will has been admitted to probate, if a later will be propounded which does not expressly revoke the former and there is any room for dispute as to its construction and effect as an implied revocation, the question can not be determined in proceedings for the probate of the latter.⁷⁴

5 De Gex M. & G. 704; Goodright v. Harwood, 3 Wils. (K. B.) 497; Seymour v. Nosworthy, Hard. 374; Nelson v. McGiffert, 3 Barb. Ch. (N. Y.) 158, 49 Am. Dec. 170.

72 Taylor v. Kelly, 31 Ala. 59, 68 Am. Dec. 150; Floyd v. Floyd, 7 B. Mon. (46 Ky.) 290; Succession of Fisk, 3 La. Ann. 705; Carter v. Thomas, 4 Greenl. (4 Me.) 241; Wells v. Wells, 35 Miss. 638; Nelson v. McGiffert, 3 Barb. Ch. (N. Y.) 158, 49 Am. Dec. 170; Rob-

inson v. Smith, 13 Abb. Pr. (N. Y.) 359.

In the event of a conflict between the provisions of a later will and an earlier will, which is not revoked in toto, the provisions of the later will prevail.—Succession of Lefort, 139 La. 51, 71 So. 215.

73 Marston v. Marston, 17 N. H. 503, 43 Am. Dec. 611.

74 Besancon v. Brownson, 39 Mich. 388.

§ 527. Wills, Partially Inconsistent, Construed Together.

Inasmuch as a second will, not in terms revoking a former will, operates as a revocation of the first only so far as it indicates a different intention as to the disposition of the same property,⁷⁵ wills not inconsistent with each other must be construed together, and all their provisions, so far as possible, be carried into effect.⁷⁶ Likewise, in the case of a codicil, the courts do not allow the will to be disturbed further than is necessary to give effect to the provisions of the later writing.⁷⁷ A codicil which does not expressly revoke a will, although professing to make a different disposition of the whole estate, is a revocation only so far as it does in fact make a different disposition.⁷⁸ Where a person is appointed guardian, executor, and trustee, a revocation by codicil of one of his offices does not extend to the others, unless a contrary intention is shown by the context.⁷⁹ If, to save repetition, the uses of one estate are declared to be similar to those of another, revocation of the first does not affect

⁷⁵ *New Orleans v. Fisk*, 2 La. Ann. 78.

⁷⁶ *Mercer's Succession*, 28 La. Ann. 564.

See, ante, § 117.

⁷⁷ *Duffield v. Duffield*, 3 Bligh N. S. 261; *Beckett v. Harden*, 4 Maule & S. 1; *Cookson v. Hancock*, 1 Keen 817; s. c., 2 Mylne & C. 606; *Clarke v. Butler*, 1 Mer. 304; *Ex parte Park*, 14 Sim. 89; *Evans v. Evans*, 17 Sim. 86; *Doe d. Murch v. Marchant*, 6 Man. & G. 813.

⁷⁸ *Brant v. Wilson*, 8 Cow. (N. Y.) 56.

⁷⁹ *Ex parte Park*, 14 Sim. 89;

Barrett v. Wilkins, 5 Jur. N. S. 687; *Fry v. Fry*, 9 Jur. 894; *Hare v. Hare*, 5 Beav. 629, 12 L. J. Ch. 344; *Graham v. Graham*, 16 Beav. 550, 22 L. J. Ch. 937; *Cartwright v. Shephard*, 17 Beav. 301; *Worley v. Worley*, 18 Beav. 58.

Compare: *Burgess v. Burgess*, 1 Colles C. C. 367; *Bubb v. Yelverton*, L. R. 13 Eq. 131; *Hill v. Walker*, 4 Kay & J. 168; *Barclay v. Maskelyne*, 5 Jur. N. S. 12; *Newman v. Lade*, 1 Younge & C. Ch. 680; *Burgess v. Burgess*, 1 Colles C. C. 367; *Conover v. Hoffman*, Tabb. Dec. (N. Y.) 429, 15 Abb. Pr. 100; s. c., 1 Bosw. (N. Y.) 214.

the second.⁸⁰ Where a specific bequest is made to a residuary legatee to be afterward named, and the residue given the person named in the will is by codicil revoked, the specific bequest is not annulled.⁸¹ A codicil expressly revoking a previous legacy, yet giving only half thereof to another, is held to be a revocation *pro tanto* only.⁸²

If two similar wills are executed on the same day, the second does not revoke the first, for the two writings taken together are considered to constitute one and the same will.⁸³ And in general every attempt will be made to educe from the papers a scheme of disposition consistent with them both,⁸⁴ especially where the rejection of the prior will would produce partial intestacy,⁸⁵ or where the later paper is styled a codicil.⁸⁶ But if the date of neither will can be ascertained, and the dispositions of the estate made by them can in no way be reconciled, both will be void.⁸⁷

§ 528. The Same Subject: Ambiguous Expressions.

An unambiguous disposition in the will is not to be revoked by doubtful expressions in a codicil;⁸⁸ yet tech-

⁸⁰ Darley v. Langworthy, 3 B. P. C. Toml. 359; reversing Darley v. Darley, Amb. 653; Salter v. Fary, 12 L. J. Ch. 411, 7 Jur. 831; Bridges v. Strachan, 8 Ch. Div. 558. See, also, Francis v. Collier, 4 Russ. 331; In re Gibson's Trust, 2 Johns. & H. 656; Evans v. Evans, 17 Sim. 108; Carrington v. Payne, 5 Ves. Jun. 404.

⁸¹ Roach v. Haynes, 6 Ves. Jun. 153.

⁸² Jones v. Jones, 17 N. C. 387.

⁸³ Odenwaelder v. Schorr, 8 Mo. App. 458.

⁸⁴ Weld v. Acton, 2 Eq. Cas. Abr. 777, p. 26; Coward v. Marshal, Cro. Eliz. 721.

⁸⁵ Freeman v. Freman, Kay 479; Plenty v. West, 1 Rob. Ecc. 264. See, also, Cookson v. Hancock, 1 Keen, 817.

⁸⁶ In re Howard, L. R. 1. P. & D. 636; Robertson v. Powell, 2 Hurl. & C. 762.

⁸⁷ Phipps v. Anglesey, 7 B. P. C. Toml. 443; Richards v. Queen's Proctor, 18 Jur. 540; Dempsey v. Lawson, 2 Prob. Div. 98.

⁸⁸ Goblet v. Beechey, 3 Sim. 24;

nical accuracy is not required and, however loose the language, if the intent to revoke be unmistakable, it will prevail.⁸⁹ But there is a distinction between inconsistencies in the same writing and contradictory provisions in different instruments; where there are separate gifts of the same property to two persons by the same will the beneficiaries may take jointly or in common; but if the gifts are made in two separate testamentary instruments, the latter is a complete revocation of the former.⁹⁰

§ 529. Revocation of Will Does Not Necessarily Revoke a Codicil Thereto.

The early rule in England was that a codicil was presumed to be dependent upon the will, and therefore a revocation of the will by implication was a revocation of the codicil.⁹¹ The rule, however, was not absolute, and proof was allowed to show that the testator intended to revoke the will only, allowing the codicil to stand;⁹² or that the codicil, from the nature of its contents, was capable of existing, independently of the will.⁹³ By the Statute of Wills of 1 Victoria, ch. 26, sec. 20, the formalities as to revocation were directed to wills or codicils, or any part thereof. The decisions under this act are to the effect that although the will was revoked, yet a codicil thereto

Gordon v. Hoffmann, 7 Sim. 29;
Joiner v. Joiner, 55 N. C. 68.

See, ante, § 117.

⁸⁹ Read v. Backhouse, 2 Russ. &
M. 546; Pilcher v. Hole, 7 Sim.
208; Carrington v. Payne, 5 Ves.
Jun. 404, 423; Ellis v. Bartrum, 25
Beav. 107.

⁹⁰ Barlow v. Coffin, 24 How. Pr.
(N. Y.) 54.

⁹¹ Coppin v. Dillon, 4 Hagg. 361,

369; Medlycott v. Assheton, 2
Addams Ecc. 229.

Compare: Usticke v. Bawden, 2
Addams 116.

⁹² Barrow v. Barrow, 2 Lee Ecc.
235.

⁹³ Tagart v. Squire, 1 Curt. 289;
In re Halliwell, 4 Notes of Cas.
400; Clogstoun v. Walcott, 5 Notes
of Cas. 623; In re Ellice, 33 L. J.
Prob. 27.

was not revoked for such reason and remained in force and effect unless in itself revoked in the manner mentioned in the statute.⁹⁴ However, if it appeared or could be shown that the testator intended to also revoke the codicil, the latter would be thereby invalidated.⁹⁵

In the United States the rule may be said to be that where a will is revoked the question as to the revocation of a codicil thereto depends upon whether or not the codicil itself can stand as an independent instrument. If the codicil can stand alone and is not directly revoked, revocation of the will will not annul it, whereas if it is dependent upon the will the rule is otherwise.⁹⁶

§ 530. Revocation of Codicil Does Not Revoke Will.

While it might often happen that a codicil is so related to and dependent upon a will that the latter could not be revoked without destroying the former, the converse is not ordinarily true. The general rule is that a codicil may be revoked without affecting the validity of the will which in itself is a full and complete instrument.⁹⁷ The question would depend upon the intent of the testator and the manner of revocation, but the mere destruction of a codicil will not in itself revoke the will.⁹⁸

⁹⁴ *Black v. Jobling*, L. R. 1 Pro. & Div. 685; *Goods of Savage*, L. R. 2 Pro. & Div. 78; *Goods of Turner*, L. R. 2 Pro. & Div. 403; *Gardiner v. Courthope*, L. R. 12 Pro. & Div. 14.

⁹⁵ *Goods of Bleckley*, L. R. 8 Pro. & Div. 169.

⁹⁶ *Youse v. Forman*, 5 Bush (Ky.) 337; *In re Pinckney's Will*, 1 Tucker (N. Y.) 436; *Osburn v. Rochester Trust & Safe Dep. Co.*,

209 N. Y. 54, Ann. Cas. 1915A, 101, 46 L. R. A. (N. S.) 983, 102 N. E. 571; *Smith's Estate*, 2 Pa. Co. Ct. Rep. 626.

⁹⁷ *In re Diamant's Estate*, 84 N. J. Eq. 135, 92 Atl. 952; *Osburn v. Rochester Trust & Safe Dep. Co.*, 209 N. Y. 54, Ann. Cas. 1915A, 101, 46 L. R. A. (N. S.) 983, 102 N. E. 571.

⁹⁸ *James v. Shrimpton*, L. R. 1 Pro. Div. 431; *Stewart's Estate*,

§ 531. Nature and Execution of Subsequent Writing Revoking Will.

Under the Statute of Frauds, it was sufficient if the intention to revoke was written out during the life of the testator and by his direction, whether signed by him or not; so a letter written at the request of the testatrix, directing the custodian of her will to destroy it, was a revocation, although the latter refused to comply.⁹⁹ However, a duly executed will could not be revoked by a subsequent uncompleted instrument, without the strongest proof of capacity, volition, final intention, and involuntary interruption.¹

Where the statutes provide, as the only modes of revocation, some mutilation, or the making of a new will or codicil, or some other writing "signed, attested, and subscribed like a will," it is not a sufficient revocation for the testator to write upon the back of the sheet containing his testament, the date, and the words "I revoke this will," and sign his name thereto.² A will which is invalid because of defective execution will not operate as a revocation of a former will, and this is true even though the defectively executed will contains a clause expressly revoking the former will. In order to revoke a will by a subsequent one, the latter must be executed with all the formalities required by law.³

149 Pa. St. 111, 24 Atl. 174. See *In re Brookman*, 11 Misc. Rep. (N. Y.) 675, 33 N. Y. Supp. 575, where it was held the intention was to revoke both codicil and will.

⁹⁹ *Walcott v. Ochterlony*, 1 Curt. 580; *In re Ravenscroft*, 18 L. J. Ch. 501.

¹ *Gillow v. Bourne*, 4 Hagg. Ecc. 192; *Blewitt v. Blewitt*, 4 Hagg. Ecc. 410.

² *Ladd's Will*, 60 Wis. 187, 50 Am. Rep. 355, 18 N. W. 734.

³ *Youse v. Forman*, 5 Bush (Ky.) 337, 338; *Semmes v. Semmes*, 7 Har. & J. (Md.) 388; *Wilbourn v. Shell*, 59 Miss. 205, 42 Am. Rep.

§ 532. The Same Subject.

In North Carolina a paper in the form of a will, although not signed or attested, if made with the intent to revoke a former will, is sufficient therefor.⁴ In Virginia it has been held that an imperfectly executed will may operate as a revocation of bequests of personalty in a previous will.⁵ In Vermont, where a will covered the first and a portion of the second pages of a sheet, and the testator wrote on the last half of the second page present words of revocation, it was an effectual cancellation, and the will could not be revived by the testator's declarations that he had republished it.⁶ But in Massachusetts, a will devising real estate can not be revoked by another writing not executed with the same formalities.⁷

It is not necessary that a will expressly revoking former wills should make a disposition of the property pre-

363; *Jackson v. Holloway*, 7 Johns. (N. Y.) 394; *Leard v. Askew*, 28 Okla. 300, *Ann. Cas.* 1912D, 234, 114 Pac. 251; *Chestnut v. Capey*, 45 Okla. 754, 146 Pac. 589.

But in Connecticut the words "this will is invalid" written on the back of the will, and signed by the testator, without being attested by witnesses, has been held sufficient.—*Witter v. Mott*, 2 Conn. 67.

Under the Statute of Wills (*Hurd's Rev. St.* 1913, ch. 148, § 17), providing that no will shall be revoked otherwise than by destroying it, or by other will, testament, or codicil in writing declaring the same, signed by testator in the presence of two or more

witnesses, and attested by them in his presence, a former will and codicil are not revoked by an instrument intended as a subsequent will which expressly revoked them, but was invalid because of the incompetency of one of the subscribing witnesses.—*Moore v. Rowlett*, 269 Ill. 88, *Ann. Cas.* 1916E, 718, 109 N. E. 682.

⁴ *Clark's Exrs. v. Eborn*, 6 N. C. 234, 235.

⁵ *Glasscock v. Smither*, 1 Call. (Va.) 479.

⁶ *Warner v. Warner's Estate*, 37 Vt. 356.

⁷ *Laughton v. Atkins*, 1 Pick. (Mass.) 535; *Reid v. Borland*, 14 Mass. 208. See, also, *Brown v. Thorndike*, 15 Pick. (Mass.) 388.

viously devised.⁸ The subsequent writing need not even be a will at all.⁹ Accordingly, it has been said that a will may become operative as a revocation of a former will, although inoperative in other respects.¹⁰

§ 533. Implied Revocation.

An implied revocation is a deduction of law from established facts.¹¹ It has been held that this implication of revocation may be rebutted by circumstances, and that the declarations of the testator in his last sickness are admissible for this purpose;¹² but the weight of authority seems to be to the contrary. It is well settled that the Statute of Frauds¹³ and the statutes in America which follow its phraseology, providing that no devise shall be revoked but by the testator canceling, and the like, only apply "to acts of direct and express revocation, and that a will may be revoked by implication or inference of law by various circumstances not within the purview of the statute."¹⁴ From this interpretation of the statutes we have the doctrine of implied revocation. Implied revocation is of two sorts: (a) An implication from a supposed change of the intention of the testator, manifested by marriage or marriage and the birth of a child, and manifested by an attempted conveyance of the estate devised; and (b) an implication arising from the necessity of the case, by an alteration in the estate or valid alienation thereof. For example, at common law the

⁸ In *re Thompson*, 11 Paige (N. Y.) 453.

⁹ *Rudy v. Ulrich*, 69 Pa. St. 177, 8 Am. Rep. 238.

¹⁰ *Laughton v. Atkins*, 1 Pick. (Mass.) 535; *Sisters of Charity v. Kelly*, 67 N. Y. 409, 415.

¹¹ *Sneed v. Ewing*, 5 J. J. Marsh. (28 Ky.) 460, 22 Am. Dec. 41.

¹² *Yerby v. Yerby*, 3 Call. (Va.) 334.

¹³ 29 Charles II, ch. 3, § 6.

¹⁴ *Garrett v. Dabney*, 27 Miss. 335.

marriage of a woman acted as an absolute revocation of her will;¹⁵ and the will of a man was revoked by a marriage from which there was issue, these circumstances producing such a change in the testator's situation as to lead to the presumption that he could not intend a disposition of property previously made to continue in force.¹⁶

Ex necessitate rei a valid conveyance of the property devised effected a revocation, and even a momentary interruption of the testator's seisin produced a like effect.¹⁷ But the courts have not gone so far as to lay down the rule that revocation may be implied from any change of circumstances affording satisfactory evidence of the testator's revoking intention. On the contrary, implied revocation takes place in consequence of a rule or principle of law, independently altogether of the actual intention of any particular testator.¹⁸ Thus, a total revocation can not be implied from the death of the legatees or devisees,¹⁹ nor from the alienation of the larger portion of the estate which was specifically disposed of by the will.²⁰

¹⁵ *Cotter v. Layer*, 2 P. Wms. 624; *Doe v. Staple*, 2 Raym. T. 684, 695.

¹⁶ *Christopher v. Christopher*, 2 Dick. 445.

See, ante, § 96, as to the effect of marriage and birth of issue on mutual or reciprocal wills.

See, ante, §§ 301-311, as to the disabilities of married women to make wills.

¹⁷ *Burgoigne v. Fox*, 1 Atk. 575.

¹⁸ *Marston v. Roe*, 8 Ad. & E.

14; *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604.

Contra: *Yerby v. Yerby*, 3 Call. (Va.) 334.

¹⁹ *Doe v. Edlin*, 4 Ad. & E. 586; *Warner v. Beach*, 4 Gray (Mass.) 162; *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604. See, also, *Fellows v. Allen*, 60 N. H. 439, 49 Am. Rep. 328.

²⁰ *Brydges v. Duchess of Chandos*, 2 Ves. Jun. 417; *Warren v. Taylor*, 56 Iowa 182, 9 N. W. 128;

When a statute in its general language embraces all kinds of revocation, both by acts of the testator and by implication of law, giving special instances in which particularly implied revocations are allowed, it is to the exclusion of all methods of revocation not especially enumerated.²¹

Under the New York statute, for example, only marriage or the birth of children operates to revoke a will by implication;²² and therefore the intention of a testator that a subsequent gift or advancement shall operate as a satisfaction of a legacy can not be presumed, for this would be a partial revocation of the will by implication from circumstances not specified in the statute.²³

§ 534. The Same Subject: Illustrations.

A will is not revoked by implication from a change of the testator's circumstances as regards the amount

Carter v. Thomas, 4 Greenl. (4 Me.) 341; *Hawes v. Humphrey*, 9 Pick. (Mass.) 350, 20 Am. Dec. 481; *Terry v. Edminster*, 9 Pick. (Mass.) 355, note; *Webster v. Webster*, 105 Mass. 538; *Wells v. Wells*, 35 Miss. 638; *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604; *In re Mickel*, 14 Johns. (N. Y.) 324; *McNaughton v. McNaughton*, 34 N. Y. 201; *Balliet's Appeal*, 14 Pa. St. 451; *Graves v. Sheldon*, 2 D. Chip. (Vt.) 71, 15 Am. Dec. 653; *Blandin v. Blandin*, 9 Vt. 210.

"Conveying a part of the estate upon which the will would other-

wise operate indicates a change of purpose in the testator as to that part; but suffering the will to remain uncanceled, evinces that his intention is unchanged with respect to other property bequeathed or devised therein."—*Carter v. Thomas*, 4 Greenl. (4 Me.) 341.

²¹ *Ordish v. McDermott*, 2 Redf. (N. Y.) 460; *Langdon v. Astor's Exrs.*, 16 N. Y. 9; *Delafield v. Parish*, 25 N. Y. 9.

²² *Parish v. Parish*, 42 Barb. (N. Y.) 274.

²³ *Langdon v. Astor*, 3 Duer (N. Y.) 477.

and relative value of his property,²⁴ nor from the testator's marriage alone, if there be no issue.²⁵ Nor yet can it be revoked by all these circumstances combined.²⁶ Revocation can not be implied by law from the death of the testator's wife, and of one of his children, leaving issue; nor from the birth of another child contemplated in the will; nor from forty years of insanity, beginning soon after the making of the will and continuing until his death; nor from a four-fold increase in the value of his property, so as greatly to change the proportion between the specific legacies given to some of the children, and the shares of other children who were made residuary legatees.²⁷

On various other pretexts efforts have been made to establish the revocation of wills. And in these cases it has been decided that the insertion of a clause,²⁸ or the changing of a date, will not effect the revocation of a will;²⁹ nor will the changing of an executor, nor the striking out of a devise, necessitate the republication of a will.³⁰ Neither is a will revoked by the refusal of one who has it in keeping to deliver it to the testator

²⁴ Warner v. Beach, 4 Gray (Mass.) 162; Webster v. Webster, 105 Mass. 538; Hoitt v. Hoitt, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604; Brush v. Wilkins, 4 Johns. Ch. (N. Y.) 506, 507; Vandemark v. Vandemark, 26 Barb. (N. Y.) 416; Wogan v. Small, 11 Serg. & R. (Pa.) 141; Balliet's Appeal, 14 Pa. St. 451; Verdier v. Verdier, 8 Rich. L. (S. C.) 135; Graves v. Sheldon, 2 D. Chip. (Vt.) 71, 15 Am. Dec. 653; Blandin v. Blandin, 9 Vt. 210.

²⁵ Hoitt v. Hoitt, 63 N. H. 475,

56 Am. Rep. 530, 3 Atl. 604; s. c., 5 Am. Prob. Rep. 529.

²⁶ Hoitt v. Hoitt, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604.

²⁷ Warner v. Beach, 4 Gray (Mass.) 162.

²⁸ Wright v. Wright, 5 Ind. 389; Dixon's Appeal, 55 Pa. St. 424. See, also, Wikoff's Appeal, 15 Pa. St. 281, 53 Am. Dec. 597.

²⁹ Dixon's Appeal, 55 Pa. St. 424.

³⁰ In re Brown's Will, 1 B. Mon. (40 Ky.) 56, 35 Am. Dec. 174.

for alteration;³¹ nor by the addition of an unexecuted codicil;³² nor by the discovery of the existence of a child.³³

A will is not made invalid because one of the subscribing witnesses subsequently became the husband of the testatrix, it being sufficient that he was a credible witness at the time of the execution;³⁴ nor by the fact that one or more of the witnesses died before probate;³⁵ nor by the death of the mother of the testatrix, and the change in her family relations by the marriage of her sister; nor by the destruction of a will made in favor of the testator; nor by the will being found among worthless paper.³⁶

§ 535. Implied Revocation by Marriage and Birth of Issue: Common law rule.

At common law, marriage with birth of issue revoked the will of a man;³⁷ and it was immaterial whether the

³¹ *Leaycraft v. Simmons*, 3 Bradf. (N. Y.) 35.

³² *Heise v. Heise*, 31 Pa. St. 246.

³³ *Ordish v. McDermott*, 2 Redf. (N. Y.) 460. See, also, *Shepherd v. Shepherd*, 5 Term Rep. 51, note; *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506.

³⁴ *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565; *Fellows v. Allen*, 60 N. H. 439, 49 Am. Rep. 328.

³⁵ *Fellows v. Allen*, 60 N. H. 439, 49 Am. Rep. 328; *Dean v. Dean's Heirs*, 27 Vt. 746.

³⁶ *Fellows v. Allen*, 60 N. H. 439, 49 Am. Rep. 328.

³⁷ *Langford v. Little*, 2 Jo. & Lat. 613, 633; *In re Shirley*, 2 Curt.

657, overruling dictum in *Hobbs v. Knight*, 1 Curt. 768; *Christopher v. Christopher*, 2 Dick. 445; *Sprague v. Stone*, 2 Amb. 721; *Overbury v. Overbury*, 2 Show. 242; *Lugg v. Lugg*, 2 Salk. 592, 1 Ld. Raym. 441; *Brown v. Thompson*, 1 Eq. Cas. Abr. 413, pl. 15; *Eyre v. Eyre*, 1 P. Wms. 304, n.

See, also, *Parsons v. Lanoe*, 1 Ves. Sen. 189, 192; *Gibbons v. Caunt*, 4 Ves. Jun. 840, 848.

At common law marriage alone did not cause a revocation by operation of law of a prenuptial will of a man, the wife having her dower rights notwithstanding the will.—*Herzog v. Trust Co.*, 67 Fla.

child were born before or after the death of the testator,³⁸ or whether it outlived or died before its father.³⁹ It has been thought that the subsequent birth of children by an existing marriage, the death of their mother, and the second marriage of their father, would revoke a will in the same manner that marriage and the birth of a child therefrom would revoke a will previously executed, the order of the events making no difference.⁴⁰ But at common law, marriage and issue did not revoke a will which did not dispose of the whole estate;⁴¹ nor when the wife and child had been both provided for in the will;⁴² nor

54, *Ann. Cas.* 1917A, 201, 64 So. 426; *Hulett v. Carey*, 66 Minn. 327, 61 *Am. St. Rep.* 419, 34 *L. R. A.* 384, 69 *N. W.* 31; *Hoy v. Hoy*, 93 *Miss.* 732, 136 *Am. St. Rep.* 548, 17 *Ann. Cas.* 1137, 25 *L. R. A.* (N. S.) 182, 48 So. 903.

38 *Doe v. Lancashire*, 5 *Term Rep.* 49; *Israell v. Rodon*, 2 *Moore P. C. C.* 51; *Matson v. Magrath*, 1 *Rob. Ecc.* 680; *s. c.*, 6 *Notes of Cas.* 709; *s. c.*, 13 *Jur.* 350.

An adoption of a child subsequent to the making of a will is not equivalent to the birth of a child so as to revoke the will.—*Evans v. Evans*, (*Texas Civ. App.*) 186 *S. W.* 815.

See, ante, § 96, as to mutual wills.

39 *Emerson v. Boville*, 1 *Phillim.* 342.

Contra: *Wright v. Netherwood*, 2 *Salk.* 593; *s. c.*, 2 *Phillim.* 266.

40 *Gibbons v. Caunt*, 4 *Ves. Jun.* 840, 848.

Under the common law the will was not revoked merely by the

subsequent birth of children.—*Woodliff v. Dunlap*, 187 *Ala.* 255, 65 So. 936.

At the common law the marriage of a man and the birth of a child subsequent to the making of a will by him had the effect of revoking such will, but, when the will was made by a man already married, the birth of a child subsequent to the making of the will did not work a revocation of such will. In the absence of a statute this principle of the common law must be held to be the law of this state.—*Easterlin v. Easterlin*, 62 *Fla.* 468, *Ann. Cas.* 1913D, 1316, 56 So. 688.

41 *Dicta* in *Brady v. Cubit*, *Doug.* 31; *Kenebel v. Scrafton*, 2 *East.* 530, 541; *Marston v. Fox*, 8 *Ad. & E.* 14, 57.

42 *Marston v. Fox*, 8 *Ad. & E.* 14; *s. c.*, 2 *Nev. & P.* 504; questioning *Brown v. Thompson*, 1 *Eq. Cas. Abr.* 413, pl. 15; *Kenebel v. Scrafton*, 2 *East* 530. See, also,

in a settlement made prior⁴³ to the execution of the will. Under the Victorian statute, marriage alone without birth of issue is made a revocation of the wills of both husband and wife, and no declaration in or out of the will can obviate this result.⁴⁴

§ 536. Will of Feme Sole Revoked by Her Marriage.

At common law marriage alone, without the birth of issue, revoked the will of an unmarried woman because in legal contemplation her identity became merged in that of her husband and she no longer had the right to make a will. Such revocation was absolute, and when the disabilities of coverture were removed by the death of her husband the will was not thereby revived.^{44a} An exception to this rule, however, was where the wife's interest in her separate property had been protected by an ante-nuptial agreement under which she had pre-

In re Cadywold, 1 Sw. & Tr. 34; s. c., 27 Law J. Prob. 36.

Under the common law a will was revoked by a subsequent marriage of the testator and birth of children, unless provision was made in the will for such contingency.—Woodliff v. Dunlap, 187 Ala. 255, 65 So. 936.

⁴³ *Israell v. Rodon*, 2 Moore P. C. C. 51, overruling *Talbot v. Talbot*, 1 Hagg. Ecc. 705; *Johnston v. Wells*, 2 Hagg. Ecc. 561. See, also, *Matson v. Magrath*, 1 Rob. Ecc. 680; s. c., 6 Notes of Cas. 709; s. c., 13 Jur. 350.

⁴⁴ Statute of 1 Victoria, ch. 26, § 18.

See, ante, § 307. Married Women's Property Act.

^{44a} See, ante, §§ 301-311. *Forse and Hembling's Case*, 4 Coke 61; *Cotter v. Layer*, 2 P. Wms. 624; *Doe v. Staple*, 2 Term Rep. 684, 695; *Hodsdon v. Lloyd*, 2 Bro. C. C. 534; *Long v. Aldred*, 3 Addams Ecc. 48; *Downes v. Timperon*, 4 Russ. 334; *Long v. Aldred*, 3 Addams Ecc. 48; *Matter of Comassi*, 107 Cal. 1, 28 L. R. A. 414, 40 Pac. 15; *Chapman v. Dismar*, 14 App. Cas. D. C. 446; *Colcord v. Conroy*, 40 Fla. 97, 23 So. 561; *Sutton v. Hancock*, 115 Ga. 857, 42 S. E. 214; *Stewart v. Mulholland*, 88 Ky. 38, 45, 21 Am. St. Rep. 320, 10 S. W. 125; *Swan v. Hammond*, 138 Mass. 45, 52 Am. Rep. 255; *Morey v. Sohler*, 63 N. H. 507, 510, 56 Am. Rep. 538, 3 Atl. 636; *Morton v. Onion*, 45 Vt. 145.

served the power of testamentary disposition of such property.^{44b} Under the statute of 1 Victoria, ch. 26, sec. 18, marriage of a *feme sole* revokes her will; but even before its enactment the will of a woman made in execution of a power was not revoked by her marriage,^{44c} nor was a will made under a power during the life of the husband revoked by his death.^{44d} But, of course, if the power was given to the wife "in case she dies in the lifetime of her husband," and in case of her surviving her husband the property is given to her absolutely, a will made during coverture is inoperative if the wife survives, as the power never arose;⁴⁵ and it will not even raise a case of election.⁴⁶

§ 537. Implied Revocation by Marriage: Regulations in the United States.

In several of the states of the Union there are statutes expressly recognizing the implied revocation of wills as at common law,⁴⁷ yet their courts all unite in hold-

^{44b} See, ante, §§ 301-311. Wright v. Englefield, Amb. 468; Rich v. Beaumont, 6 Bro. P. C. 152; Douglas v. Cooper, 3 Myl. & K. 378; Stewart v. Mulholland, 88 Ky. 38, 21 Am. St. Rep. 320, 10 S. W. 125; Osgood v. Bliss, 141 Mass. 474, 477, 55 Am. Rep. 488, 6 N. E. 527; Morey v. Sohler, 63 N. H. 507, 511, 56 Am. Rep. 538, 3 Atl. 636; Bradish v. Gibbs, 3 Johns. Ch. (N. Y.) 523.

^{44c} Logan v. Bell, 1 Com. B. 872. See, also, Douglas v. Cooper, 3 Mylne & K. 378.

^{44d} Du Hourmelin v. Sheldon, 19 Beav. 389; Clough v. Clough, 3

Mylne & K. 296; Morwan v. Thompson, 3 Hagg. Ecc. 239.

⁴⁵ Price v. Parker, 16 Sim. 198; Trimmell v. Fell, 16 Beav. 537; Willock v. Noble, L. R. 7 H. L. 580.

⁴⁶ Willock v. Noble, L. R. 7 H. L. 580; Blaiklock v. Grindle, L. R. 7 Eq. 215, 17 W. R. 114.

⁴⁷ Blodgett v. Moore, 141 Mass. 75, 5 N. E. 470; Phaup v. Wooldridge, 14 Grat. (Va.) 332.

A will which has been revoked by the marriage of the testator is revived by the execution of a codicil subsequent to the marriage.

ing that statutes emancipating the wife from common-law disabilities as to property and property rights, and conferring upon her authority to make a valid will, have the effect of abrogating the rule under which marriage was held to revoke a former will.⁴⁸ And even where marriage of a male or female or marriage and the birth of a child operate as a revocation, the general rule is that if the will had made provision for such contingency, there is no revocation;⁴⁹ nor does revocation by

—Estate of Cutting, 172 Cal. 191, 155 Pac. 1002.

A will is revoked by subsequent common law marriage.—*In re Matteote's Estate*, 59 Colo. 566, 151 Pac. 448.

Will is revoked by subsequent marriage of the testator.—*Van Guelpan's Estate*, 87 Wash. 146, 151 Pac. 245.

⁴⁸ *Hastings v. Day*, 151 Iowa 39, Ann. Cas. 1913A, 214, 34 L. R. A. (N. S.) 1021, 130 N. W. 134.

See, ante, § 311.

The rule thus having its foundation in the disabilities of coverture with respect to the ownership and control of property, and the right to contract with reference thereto, and not being applicable where those disabilities are removed by statute and a wife is legally empowered to make a valid will of her separate estate, her marriage will not be held to revoke a will previously executed. It is a clear case for the application of the maxim that a rule ceases to be obligatory when the reason for it ceases.—*Hastings v. Day*, 151 Iowa

39, Ann. Cas. 1913A, 214, 34 L. R. A. (N. S.) 1021, 130 N. W. 134; *In re Hunt*, 81 Me. 275, 17 Atl. 68; *Noyes v. Southworth*, 55 Mich. 173, 54 Am. Rep. 359, 20 N. W. 891; *Kelly v. Stevenson*, 85 Minn. 247, 89 Am. St. Rep. 545, 56 L. R. A. 754, 88 N. W. 739; *Fellows v. Allen*, 60 N. H. 439, 49 Am. Rep. 328; *Ward's Will*, 70 Wis. 251, 5 Am. St. Rep. 174, 35 N. W. 731.

A will is not revoked by marriage.—*Herzog v. Trust Co.*, 67 Fla. 54, Ann. Cas. 1917A, 201, 64 So. 426.

The will is not revoked by the subsequent marriage of the testator.—*In re Andrest's Estate*, 96 Misc. Rep. 389, 160 N. Y. Supp. 505.

⁴⁹ *Woodliff v. Dunlap*, 187 Ala. 255, 65 So. 936.

Under some statutes a will is revoked where the maker marries and dies leaving a widow.—*In re Roton's Will*, 95 S. C. 118, 78 S. E. 711.

Under the Washington statute a will is not revoked by the subsequent marriage of the testator, if

marriage apply to a will made in the exercise of a collateral power of appointment,⁵⁰ when in default of such appointment the estate would not pass to the heir, personal representative, or next of kin.⁵¹ In Georgia, it has been held that a testator may rebut the presumption of revocation raised by marriage and the birth of a child by a declaration in writing, executed with the same formalities required for a will.⁵² Under the statute of Rhode Island, it has been held marriage is only presumptive evidence of an intent to revoke, and the contrary may be shown.⁵³ In Illinois, under the statute, marriage acts *per se* as a revocation of a prior will;⁵⁴ and in the same state it has been held, under a statute making husband and wife heir to one another when there are no children or descendants, that marriage acts as a revocation of a will made prior thereto, which made no provision for the contingency of marriage and disposed of the entire estate, unless there are facts subsequent to the marriage which show an intention that the will shall stand.⁵⁵ Marriage without issue does not revoke a will in Texas,⁵⁶ nor, it would seem, in Indiana.⁵⁷ In New York, from the facts of marriage and the birth of a child the law pre-

the wife is provided for in the will, or it shows an intention to make no provision for her.—Koontz v. Koontz, 83 Wash. 180, 145 Pac. 201.

⁵⁰ Morgan v. Ireland, 1 Idaho 786; Byrd v. Surles, 77 N. C. 435.

⁵¹ Phaup v. Wooldridge, 14 Grat. (Va.) 332.

⁵² Deupree v. Deupree, 45 Ga. 415. See, also, Miller v. Phillips, 9 R. I. 141.

⁵³ Wheeler v. Wheeler, 1 R. I. 364.

⁵⁴ McAnnulty v. McAnnulty, 120 Ill. 26, 60 Am. Rep. 552, 11 N. E. 397; Duryea v. Duryea, 85 Ill. 41. See, also, cases cited in note to McAnnulty v. McAnnulty, 120 Ill. 26, 60 Am. Rep. 552, 11 N. E. 397; Ill. Rev. Stats., ch. 39, § 10.

Contra: In re Tuller's Will, 79 Ill. 99, 22 Am. Rep. 164.

⁵⁵ Tyler v. Tyler, 19 Ill. 151.

⁵⁶ Morgan v. Davenport, 60 Tex. 230.

⁵⁷ Bowers v. Bowers, 53 Ind. 430.

sumes an intention on the part of a testator to revoke a will previously made disposing of the whole estate, where neither in the will nor otherwise has there been made any provision for the new relation.⁵⁸

§ 538. The Same Subject.

Under a statute prescribing the modes of revoking a will and recognizing implied revocation "from subsequent change in the condition or circumstances of the testator," marriage will revoke the will of a woman.⁵⁹ In New York, it has been held that marriage is a revocation of a woman's will, notwithstanding an ante-nuptial agreement whereby she retains full control of her property.⁶⁰ And the New York Acts of 1848, 1849, and 1860 for the protection of the property of married women did not by implication repeal the provision of the Revised Statutes that a will executed by an unmarried woman should be deemed revoked by her subsequent marriage;⁶¹ nor are the provisions of a statute as to the revocation of a woman's will by her subsequent marriage abrogated by an act relieving married women from the disability which debarred them from making a will.⁶²

The will of a woman, revoked by marriage, is not revived by her husband's death under the laws of Pennsylvania, California, Nevada, North Dakota, South Dakota, and Montana. In several states, if provision be made for the contingency, marriage does not revoke a

⁵⁸ *Havens v. Van Den Burgh*, & C. (N. Y.) 512; s. c., 4 Hun 1 Denio (N. Y.) 27; *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506. (N. Y.) 213.

⁵⁹ *Swan v. Hammond*, 138 Mass. 45, 52 Am. Rep. 255. See, also, ⁶¹ *Loomis v. Loomis*, 51 Barb. (N. Y.) 257.

⁶² *Brown v. Clark*, 77 N. Y. 369. See, also, *Fransen's Will*, 26 Pa. Church v. Crocker, 3 Mass. 17. St. 202.

⁶⁰ *Lathrop v. Dunlop*, 6 Thomp.

woman's will.⁶³ In some states the will of a single woman is not revoked by her subsequent marriage,⁶⁴ and it has been held in Michigan that where a *feme covert* has the power to make a will as if she were unmarried, the will of a single woman is not revoked by marriage alone.⁶⁵ A will revoked by the marriage of the testatrix may be declared void whenever such fact appears, even in a decree on final accounting.⁶⁶

§ 539. Implied Revocation From Birth of Issue.

The general rule is that the birth of a child unprovided for in its father's will works a revocation thereof.⁶⁷ And although the rule is founded upon the supposed change of intention on the part of the testator, he can not prevent its operation by parol declaration of an opposite intent.⁶⁸ While a posthumous child for whom no provision has been made continues to live, the will must be deemed revoked, and the property must descend ac-

⁶³ See synopsis of statutes, Appendix, this volume.

⁶⁴ *Fellows v. Allen*, 60 N. H. 439, 49 Am. Rep. 328; *Webb v. Jones*, 36 N. J. Eq. 163. See, also, *In re Tuller's Will*, 79 Ill. 99, 22 Am. Rep. 164.

⁶⁵ *Noyes v. Southworth*, 55 Mich. 173, 54 Am. Rep. 359, 20 N. W. 891.

⁶⁶ *Davis' Estate*, 1 Tuck. (N. Y.) 107.

⁶⁷ *Hart v. Hart*, 70 Ga. 764; *Hughes v. Hughes*, 37 Ind. 183; *Alden v. Johnson*, 63 Iowa 124, 18 N. E. 696; *Sneed v. Ewing*, 5 J. J. Marsh. (28 Ky.) 460, 22 Am. Dec. 41; *Hackett v. Stephens*, 3 La. Ann. 271; *Lewis v. Hare*, 8 La.

Ann. 378; *Bloomer v. Bloomer*, 2 Bradf. (N. Y.) 339; *Ash v. Ash*, 9 Ohio St. 383; *Tomlinson v. Tomlinson*, 1 Ashm. (Pa.) 224; *Coates v. Hughes*, 3 Bin. (Pa.) 498; *Wilcox v. Rootes*, 1 Wash. (Va.) 140.

⁶⁸ *Marston v. Roe*, 8 Ad. & E. 14; *Goodtitle v. Otway*, 2 H. Bl. 522; *Doe v. Lancashire*, 5 Term Rep. 61; *Kenebel v. Scrafton*, cited in 5 Ves. Jun. 663; s. c., 2 East 530; *Israell v. Rodon*, 2 Moore P. C. C. 51; *Matson v. Magrath*, 1 Rob. Ecc. 680; s. c., 6 Notes of Cas. 709; s. c., 13 Jur. 350. See, also, *Gibbons v. Caunt*, 4 Ves. Jun. 840, 848; *Hall v. Hill*, 1 Dru. & War. 114.

according to the statute.⁶⁹ The repeal of the Iowa statute which provided for an abatement of legacies to provide for a child born after the will, operated to restore the common law rule that the birth of a child operated as a revocation of a will.⁷⁰ Under a statute in that state, which admits to a share in the inheritance an illegitimate child which has been recognized by its father, the birth and recognition of such a child will act as a revocation as though it had been legitimate.⁷¹ The general rule that the birth of a child after the making of a will acts as a revocation of it, would seem to be a part of the common law of America, independent of statutes.⁷² There are, however, various enactments on the subject. In many states the statutes by various provisions protect the interests of children born after the making of a will, providing generally that in the absence of some mention in the will or provision for them, the testament shall be void. The statutes should be consulted for the details.⁷³ But where provision is made for the children of a marriage, the birth of a child does not revoke the will;⁷⁴ and the birth of a child which could not have been benefited by the revocation of a will did not under the common law work a revocation thereof.⁷⁵

Contra: *Brady v. Cubit*, Doug. 31; *Gibbens v. Cross*, 2 Addams Ecc. 455; *Fox v. Marston*, 1 Curt. 494.

⁶⁹ *Morse v. Morse*, 42 Ind. 365.

⁷⁰ *Negus v. Negus*, 46 Iowa 487, 26 Am. Rep. 157; *Fallon v. Chidester*, 46 Iowa, 588, 26 Am. Rep. 164.

⁷¹ *Milburn v. Milburn*, 60 Iowa 411, 14 N. W. 204.

⁷² *McCullum v. McKenzie*, 26 Iowa 510.

⁷³ See synopsis of statutes, Appendix, this volume.

⁷⁴ *Savage v. Mears*, 2 Rob. Ecc. 570.

⁷⁵ *Sheath v. York*, 1 Ves. & B. 390. See, also, *Hollway v. Clarke*, 1 Phillim. 339; *Walker v. Walker*, 2 Curt. 854; *Gibbons v. Caunt*, 4 Ves. Jun. 840, 849; *Wright v. Netherwood*, 2 Salk. 593, n.

§ 540. Implied Revocation From Void Conveyance.

Prior to the statute of 1 Victoria, ch. 26, an instrument purporting to be a conveyance, but incapable of taking effect as such might nevertheless operate to revoke a previous devise on the principle, it would seem, that the attempted act of conveyance was inconsistent with the testamentary intention and therefore, though ineffectual to vest the property in the alienee, it produced a revocation of the devise.⁷⁶ The rule did not apply, however, where the conveyance failed to take effect because of the incapacity of the testator to make a disposition, for there could be no intent to revoke without a disposing mind.⁷⁷ Questions of this nature, however, can not arise in England since the act of 1 Victoria, ch. 26; nor under the American statutes which make substantially similar provisions⁷⁸ as to the revocation of wills, except that the devisee may take the land subject to the rights which others may claim therein, to be enforced in a suit in equity.

§ 541. Alteration of Circumstances as Implying Revocation.

The early rule as to devises of real property in England was that no man could devise realty which he did not own at the time the will was made, and also which he did not continue to own uninterruptedly until the time of his death.⁷⁹ Therefore any subsequent transfer of real property owned at the time the will was made operated as a revocation of a prior devise of such property.

⁷⁶ *Montague v. Jefferies*, Moor. 429, pl. 599; *Doe v. Llandaff*, 2 Bos. & P. N. R. 491; *Shore v. Pinke*, 5 Term Rep. 124, 310; *Vawser v. Jeffery*, 2 Swanst. 274.

⁷⁷ *Ellbeck v. Wood*, 1 Russ. 564.

⁷⁸ *Ford v. De Pontes*, 30 Beav. 572.

⁷⁹ See §§ 26, 27, 28, 29, 229.

This rule prevailed to an extent at one time in the United States.⁸⁰ This was changed by the statute of 1 Victoria, ch. 26, sec. 3, so that a devise operates on property owned at the time of the death of the testator and includes, in a residuary clause, property acquired after the will was made; and such is also the rule in the United States.⁸¹

Revocation of devises by an alteration of estate, is placed on an entirely new footing by the statute of 1 Victoria, ch. 26, sec. 19, which provides that "no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances." In several of the United States similar statutes are to be found, providing in substance that no conveyance or alteration of estate which does not wholly divest the testator of all interest in the property mentioned in the will, shall prevent the operation of the instrument with respect to that which the testator may have power to dispose of at the time of his death.⁸²

§ 542. Sale of Property Devised, as Affecting Revocation.

The general rule is that a conveyance of an estate or interest therein previously devised or bequeathed is deemed a revocation thereof if so expressed in the conveyance and, whether or not so expressed, it will act as a revocation if the provisions of the conveyance are totally inconsistent with the devise or bequest. If the transfer be upon condition which has failed it would then stand as if no transfer had been made.⁸³ Although the will directs

⁸⁰ See § 230.

⁸¹ See §§ 30, 238, 239.

⁸² See synopsis of statutes, Appendix, this volume.

⁸³ *Meily v. Knox*, 269 Ill. 463, 110 N. E. 56; *Krieg v. McComas*,

126 Md. 377, 95 Atl. 68; *In re Smith* (*Moore v. Smith*), (Mich.) 158 N. W. 148; *In re Sinnott's Will*, 82 Misc. Rep. 219, 143 N. Y. Supp. 546; *Estate of Gensimore*, 246 Pa. 216, 92 Atl. 134.

property to be sold and disposition to be made of the proceeds, and the testator sells the property in his lifetime, it is a revocation of the devise notwithstanding the direction to convert the property into money.⁸⁴ Where a devise is revoked by a sale of the devised property, the proceeds of the sale become a part of the general estate.⁸⁵ But the rule that a conveyance of lands specifically devised amounts to a revocation does not apply where the deed is obtained by fraud or undue influence.⁸⁶

§ 543. Agreements to Convey Property Devised, Effect Of.

It is provided by the statutes of some states that an agreement to convey property previously devised or bequeathed does not revoke the gift, but that the property shall pass to the devisees, subject to such remedies for enforcement of specific performance as might have been had against the heirs or next of kin; likewise a charge or encumbrance upon real or personal estate does not work a revocation of a will, but the devises or bequests take effect subject to the encumbrance. This would be the case unless it appear in the will or in the instrument

Where a testator conveys to another real property specifically devised, and does not afterwards become possessed of the same, and the will contains no provision for such contingency, the devise is revoked.—*Lang v. Vaughn*, 137 Ga. 671, Ann. Cas. 1913B, 52, 40 L. R. A. (N. S.) 542, 74 S. E. 270.

A conveyance in fee is a revocation of a devise, although the grantor reserve to himself a ground rent.—*Skerrett v. Burd*, 1 Whart. (Pa.) 246.

A deed conveying all the property bequeathed is a revocation of the whole will.—*Epps v. Dean*, 28 Ga. 533; *Bowen v. Johnson*, 6 Ind. 110, 61 Am. Dec. 110.

⁸⁴ *May v. Sherrard's Legatees*, 115 Va. 617, Ann. Cas. 1915B, 1131, 79 S. E. 1026.

⁸⁵ *Stender v. Stender*, 181 Mich. 648, 148 N. W. 255; *In re Sinnott's Will*, 163 App. Div. 817, 148 N. Y. Supp. 637.

⁸⁶ *Yott v. Yott*, 265 Ill. 364, 106 N. E. 959.

creating the charge that the testator intended it to act as a revocation.

In Alabama, making a contract for the sale of land does not revoke a previous devise in the absence of any writing evincing an intention on the part of the testator to revoke it, unless the whole of the purchase money has been paid.⁸⁷ Accordingly, where one made a sale and conveyance of a part of the lands which he had previously devised, and a greater part of the price remained unpaid, it did not act as a revocation; and oral declarations of the deceased tending to show an intent to revoke the devise at some future time, or a present oral revocation, can not be admitted as evidence.⁸⁸

§ 544. Implied Revocation From Alteration of Estate Generally.

A conveyance and sale of the whole of the testator's title and interest in property devised is a revocation of that devise;⁸⁹ and, under modern statutes, where any interest remains in the testator, "it is now scarcely possible for any residuum of interest in the testator to escape from a previous devise."⁹⁰ A covenant to convey is a revocation of the equitable interest in the property so that the devisee takes nothing but the bare legal title,⁹¹ with a right to the rent until the conveyance is com-

⁸⁷ *Powell's Distributees v. Powell's Legatees*, 30 Ala. 697.

⁸⁸ *Slaughter v. Stephens*, 81 Ala. 418, 2 So. 145.

⁸⁹ *Arnald v. Arnald*, 1 Bro. C. C. 401.

⁹⁰ *Lowndes v. Norton*, 33 Law J. Ch. 583. See, also, *Prater v. Whittle*, 16 S. C. 40.

⁹¹ *Donohoo v. Lea*, 1 Swan. (Tenn.) 119, 55 Am. Dec. 725; *Farrar v. Winterton*, 5 Beav. 1; *Moore v. Raisbeck*, 12 Sim. 123; *Hall v. Bray*, 1 N. J. L. 212.

See, ante, §§ 240-247, as to wills of contingent interests in real property.

pleted.⁹² A subsequent conveyance of a portion of the property devised is a revocation *pro tanto* only.⁹³ Thus, where property previously devised was conveyed in trust to pay debts, it was a revocation *pro tanto* only, and so much as remained after the payment of the debts went to the devisees.⁹⁴ So, too, a will disposing of both real and personal property is not revoked as to the latter by a sale of the former.⁹⁵ Neither will the execution of a deed conveying a portion of his estate to his wife revoke a previous will by which the testator's whole estate was given to her.⁹⁶

§ 545. The Same Subject.

Incurring debts that swallow up all the estate given to a testator's own children, but leaving intact a legacy to a bastard grandchild, does not of itself revoke the will.⁹⁷ No revocation is to be implied from the testator's acquiring a larger interest than when he made the will. If after the execution of his will a testator purchases land which would be included in the general description of the land devised by the will, it does not operate as a revocation either wholly or partially.⁹⁸ And where a testator makes a specific bequest of property, which he holds upon lease and afterward acquires a fee in the same, it has been ruled that the entire interest possessed by the testator at his death passed under the bequest.⁹⁹

⁹² *Watts v. Watts*, L. R. 17 Eq. 217.

⁹³ *Brown v. Thorndike*, 15 Pick. (Mass.) 388; *Balliet's Appeal*, 14 Pa. St. 451.

⁹⁴ *Livingston v. Livingston*, 3 Johns. Ch. (N. Y.) 148. See, also, *Jones v. Hartley*, 2 Whart. (Pa.) 103.

⁹⁵ *Warren v. Taylor*, 56 Iowa 182, 9 N. W. 128.

⁹⁶ *Clingan v. Mitcheltree*, 31 Pa. St. 25.

⁹⁷ *Wogan v. Small*, 11 Serg. & R. (Pa.) 141, 143.

⁹⁸ *Blandin v. Blandin*, 9 Vt. 210.

⁹⁹ *Cox v. Bennett*, L. R. 6 Eq. 422.

A mortgage on part of the property to the sole beneficiary under the will, although made by the testator in the belief that the will was invalid and with the intention of substituting it for the will, is not a revocation under the statute.¹ In Delaware, a will of lands held in common is not revoked by the testator acquiring the whole in severalty; but the after-acquired portion of the estate does not pass.²

§ 546. Intent to Revoke, Without the Performance of Some Act, Is Insufficient.

Without some act of revocation, an intention to revoke, however frequently expressed, is not sufficient.³ Some

¹ *Stubbs v. Houston*, 33 Ala. 555.

See, ante, §§ 240-247, as to wills of contingent interests in real property.

² *Duffel's Lessee v. Burton*, 4 Har. (Del.) 290.

³ *Cheese v. Lovejoy*, L. R. 2 Pro. Div. 251; *Bohleber v. Rebstock*, 255 Ill. 53, Ann. Cas. 1913D, 307, 41 L. R. A. (N. S.) 105, 99 N. E. 75; *Runkle v. Gates*, 11 Ind. 95; *Gains v. Gains*, 2 A. K. Marsh (9 Ky.) 190, 12 Am. Dec. 375; *Graham v. Burch*, 47 Minn. 171, 28 Am. St. Rep. 339, 49 N. W. 697; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Delafield v. Parish*, 25 N. Y. 9; *Nelson v. Public Admr.*, 2 Bradf. (N. Y.) 210; *Jackson v. Betts*, 9 Cow. (N. Y.) 208; *Kent v. Mahaffey*, 10 Ohio St. 204; *Lewis v. Lewis*, 2 Watts & S. (Pa.) 455; *Clingan v. Mitcheltree*, 31 Pa. St. 25; *Blanchard's Heirs v. Blanchard's Heirs*, 32 Vt. 62.

See, ante, § 518.

It is a settled law that where there is a statute providing the method by which a will may be revoked, the method provided by the statute is exclusive and the original will, if valid, can not be revoked, except in one of the modes prescribed by the statute.—In *re Ballard's Estate*, (Okla.) 155 Pac. 894; *Evans v. Evans*, (Tex. Civ. App.) 186 S. W. 815.

"The mere intention to revoke a will, unaccompanied by any act of the testator to execute that intention, will not be sufficient to revoke the will, even though the execution of the intention was frustrated by the fraud and improper conduct of other persons. Slight acts of tearing, burning, or cancelling, with the purpose and intention of revoking a will, may be sufficient for that purpose, but the intention to revoke, unaccom-

act of the testator himself, or at his direction, or by his sanction, is necessary.⁴ For example, where a testator to whom a child has been born after the execution of his will, fell sick and inquired of his physician whether he were dangerously ill, as he wished to make some provision for his youngest child, and at the suggestion of the physician, who thought him better, deferred the matter until too late, the circumstances were held not to amount to a revocation.⁵ A partial burning, or slight tearing, with the intent to destroy, is a revocation.⁶ But an unsuccessful attempt to burn a will by which the cover only was scorched, was held not to amount to a revocation. "To hold that it was so," said the court, "would be saying that a strong intention to burn was a burning."⁷

The intention of a testator to revoke his will, even when committed to writing, is not sufficient unless the statutory forms are complied with.⁸ There are cases in which the testator directed another to burn or destroy his will, and was deceived by the statement that his command had been obeyed, or by seeing another paper thrown upon the fire, where it has been held that there was no revocation.⁹

panied by any of the acts of destruction required by the statute, is insufficient."—*Bohleber v. Rebstock*, 255 Ill. 53, *Ann. Cas.* 1913D, 307, 41 L. R. A. (N. S.) 105, 99 N. E. 75.

⁴ *Steele v. Price*, 5 B. Mon. (44 Ky.) 58.

⁵ *McCay v. McCay*, 5 N. C. 447.

⁶ *Bibb d. Mole v. Thomas*, 2 W. Bl. 1043.

⁷ *Doe d. Reed v. Harris*, 6 Ad. & El. 209; s. c., 2 Nev. & P. 615.

⁸ *De lafield v. Parish*, 1 Redf. (N. Y.) 30; s. c., 25 N. Y. 9; *Blanchard's Heirs v. Blanchard's Heirs*, 32 Vt. 62.

⁹ *Runkle v. Gates*, 11 Ind. 95; *Hise v. Fincher*, 32 N. C. 139, 51 Am. Dec. 383; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Boyd v. Cook*, 3 Leigh (Va.) 32; *Malone's Admr. v.*

§ 547. Acts Alone Do Not Work a Revocation Unless the Intent to Revoke Exists.

The mere act of cancellation, erasure, or obliteration will not constitute a revocation of a will in the absence of an intention that such should be its effect. Although every act of cancellation is *prima facie* a revocation, evidence is admissible to prove the contrary.¹⁰ This is expressed in the statutes of many of the states. Where there is strong reason for supposing that the testator had unintentionally destroyed his will, or that it was destroyed without his concurrence, there is no revocation.¹¹ Inadvertently throwing ink instead of sand upon the paper does not revoke the will.¹² And it has been held not to constitute a revocation where a few days after executing his will the testator, being in doubt as to the validity of the signature of his surname, caused it to be erased and signed his full name in the presence of two other attesting witnesses.¹³ If the testator, either of his own volition or upon the remonstrance of another, leaves

Hobbs, 1 Rob. (Va.) 346, 39 Am. Dec. 263.

¹⁰ *Giles v. Warren*, L. R. 2 P. & D. 401; *Bigge v. Bigge*, 9 Jur. 192; s. c., 3 Notes of Cas. 601; *In re Tozer*, 2 Notes of Cas. 11; s. c., 7 Jur. 134; *In re Hannam*, 14 Jur. 558; *Clarke v. Scripps*, 16 Jur. 783; s. c., 2 Rob. Ecc. 563.

See, ante, § 518.

The issue of revocation involved two distinct facts: The physical act of destruction, and the intent with which the act was done. "All the destroying in the world without intention will not revoke a will, nor all the intention in the

world without destroying; there must be the two."—*Cheese v. Lovejoy*, L. R. 2 Pro. Div. (Eng.) 251; *Managle v. Parker*, 75 N. H. 139, Ann. Cas. 1912A, 269, 24 L. R. A. (N. S.) 180, 71 Atl. 637.

¹¹ *Davis v. Davis*, 2 Addams Ecc. 223. See, also, *Patten v. Poulton*, 1 Sw. & Tr. 55; s. c., 27 L. J. Prob. 41; s. c., 4 Jur. N. S. 341; *Haines v. Haines*, 2 Vern. 441; *Steele v. Price*, 5 B. Mon. (44 Ky.) 58.

¹² *Burtenshaw v. Gilbert*, Cowp. 52.

¹³ *Frear v. Williams*, 7 Baxt. (66 Tenn.) 550.

unfinished the work of destruction which he had begun, the will remains unrevoked.¹⁴

A clause of revocation must indicate an intent to revoke in the present.¹⁵ An indorsement on a will indicating an intention to alter or modify it at a future time will not constitute a revocation.¹⁶ But where a testator wrote upon a will, "It is my intention at some future time to alter the tenor of the above will, or rather, to make another will; therefore, be it known, if I should die before another will is made I desire that the foregoing be considered as revoked and of no effect," it was considered a present revocation.¹⁷

§ 548. Evidence of Intention to Revoke.

Since it is the intention of the testator that he must decide whether an obliteration,¹⁸ or the making of a subsequent will,¹⁹ or any other revocatory act, shall be effective, questions often arise involving the admissibility and weight of evidence of intention, and the decisions are by no means uniform. Thus, statements made by the testator some time after the supposed revocation are not admissible;²⁰ and declarations of an intention to revoke a will, not made at the time of an ineffectual attempt at a

¹⁴ *Elms v. Elms*, 1 Sw. & Tr. 155; s. c., 27 L. J. Prob. 96; s. c., 4 Jur. N. S. 341; *Doe v. Perkes*, 3 Barn. & Ald. 489. See, also, *In re Colberg*, 1 Notes of Cas. 90; s. c., 2 Curt. 832; *In re Cockayne*, 1 Dean. 177; s. c., 2 Jur. N. S. 454.

¹⁵ *Cleoburey v. Beckett*, 14 Beav. 583, 588; *Burton v. Gowell*, Cro. Eliz. 306; *Thomas v. Evans*, 2 East 488; *Griffin v. Griffin*, 4 Ves. Jun. 197, n.

¹⁶ *Ray v. Walton*, 2 A. K. Marsh (9 Ky.) 71.

¹⁷ *Brown v. Thorndike*, 15 Pick. (Mass.) 388.

¹⁸ *Jackson v. Holloway*, 7 Johns. (N. Y.) 394; *Means v. Moore*, 3 McCord L. (S. C.) 282.

¹⁹ *Taylor v. Taylor*, 2 Nott & McC. (S. C.) 482.

²⁰ *Caeman v. Van Harke*, 33 Kan. 333, 6 Pac. 620.

written revocation, are inadmissible.²¹ But declarations of a testator at the time of revoking a will have generally been admitted, when testified to by disinterested parties.²² And admissions of the testator are universally admissible when part of the *res gestæ*.²³

²¹ Ladd's Will, 60 Wis. 187, 50 Am. Rep. 355, 18 N. W. 734.

The fact that the testator declared an intention to alter his will, and that he was persuaded not to do so, is not admissible to show that the will was fraudulently prevented from being revoked.—*Smith v. Fenner*, 1 Gall. (U. S. C. C.) 170, Fed. Cas. No. 13046.

Verbal statements by the testator to the effect that he has not made a will do not tend to prove revocation.—*Toebbe v. Williams*, 80 Ky. 661.

Evidence of the testator's intention orally announced to adopt the prior of two wills can not be received.—*Daniel v. Nockolds*, 3 Hagg. Ecc. 777. Declarations of an intent to die intestate, coupled with evidence that a subsequent will had been made by the testator and stolen from him, will not be sufficient to revoke the first will in the absence of proof of the contents of the later.—*Hylton v. Hylton*, 1 Grat. (Va.) 161.

²² *Boyle v. Boyle*, 158 Ill. 228, 42 N. E. 140; *Behrens v. Behrens*, 47 Ohio St. 323, 21 Am. St. Rep. 820, 25 N. E. 209; *In re Steinke's Will*, 95 Wis. 121, 70 N. W. 61.

The statements of the testator, identifying the earlier will as the

one he wanted and which he had requested his counsel to procure, were competent evidence for the consideration of the jury as indicative of his intention or plan to destroy the wills which could not be found, and to revive, or to select, the will propounded as his final will.—*Davis v. Sigourney*, 8 Metc. (Mass.) 487; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; *Williams v. Williams*, 142 Mass. 515, 8 N. E. 424; *Lane v. Moore*, 151 Mass. 87, 21 Am. St. Rep. 430, 23 N. E. 828; *Aldrich v. Aldrich*, 215 Mass. 164, 102 N. E. 487.

See, ante, §§ 52-54, as to evidence of parol declarations and of extrinsic circumstances.

See, ante, §§ 110-112, as to evidence of parol declarations and of extrinsic circumstances in relation to conditional or contingent wills.

See, ante, §§ 122-126, as to evidence of facts and declarations on the question of intent to revoke a duplicate will.

²³ *Barksdale v. Hopkins*, 23 Ga. 332; *Blackett v. Ziegler*, 153 Iowa 344, Ann. Cas. 1913E, 115, 37 L. R. A. (N. S.) 291, 133 N. W. 901; *Hayes v. West*, 37 Ind. 21; *Caeman v. Van Harke*, 33 Kan.

In England it has been held that subsequent declarations of the testator are admissible to rebut the presumption of revocation,²⁴ but are not admissible to prove the *act* of revocation.²⁵ As evidence of the *animus* with which an act was done, less weight is to be attached to subsequent than to contemporaneous declarations of the testator.²⁶ Evidence is not admissible to show that the testator made certain erasures with *animo testandi*, when those erasures do not materially affect the meaning of the will.²⁷

Parol evidence is inadmissible to prove instructions given by a testator at the time of executing his will, that upon certain contingencies it should become inoperative;²⁸ and in general, parol evidence of the revocation of a will is inadmissible.²⁹ Yet it has been said that revocation is a question of intention, and that any fact tending to show the intention is admissible.³⁰ Accordingly, we find that where a testator having in his hands

333, 6 Pac. 620; Townshend v. Howard, 86 Me. 285, 20 Atl. 1077; Colvin v. Warford, 20 Md. 357; Pickens v. Davis, 134 Mass. 252, 45 Am. Rep. 322; Williams v. Williams, 142 Mass. 515, 8 N. E. 424; Board of Comrs. of Rice County v. Scott, 88 Minn. 386, 93 N. W. 109; Lane v. Hill, 68 N. H. 275, 73 Am. St. Rep. 591, 44 Atl. 393; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71; McClure v. McClure, 86 Tenn. 174, 6 S. W. 44; In re Gould's Will, 72 Vt. 316, 47 Atl. 1082; Carpenter v. Miller's Exrs., 3 W. Va. 174, 100 Am. Dec. 744.

²⁴ Keen v. Keen, L. R. 4 P. & D. 105.

²⁵ Staines v. Stewart, 2 Sw. & Tr. 320; s. c., 31 L. J. Prob. 10, 8 Jur. N. S. 440.

²⁶ Pemberton v. Pemberton, 13 Ves. Jun. 290, 310; Johnson v. Lyford, L. R. 1 P. & D. 546; In re Weston, L. R. 1 P. & D. 633.

²⁷ Clark v. Smith, 34 Barb. (N. Y.) 140.

²⁸ Sewell v. Slingsluff, 57 Md. 537.

²⁹ Jackson v. Kniffen, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390; Kent v. Mahaffey, 10 Ohio St. 204.

³⁰ Boudinot v. Bradford, 2 Yeates (Pa.) 170; Eyster v. Young, 3 Yeates (Pa.) 511.

two wills, destroyed the one he intended to keep, evidence of his intention was admitted.³¹ And where a mutilated will was found in an unusual place, parol evidence of acts and declarations of the testator were admitted to show whether the mutilation was done by him with an intent to revoke.³² So, too, the fact that the former will bequeathed to the widow a larger interest than the latter, is admissible in proceedings to show that the second will was mutilated by her and not by the testator.³³

§ 549. The Same Subject.

To establish the revocation of a will, evidence of the contents of a subsequent will is inadmissible unless the destruction of the latter can be proven, or its absence explained according to the general rule that secondary evidence is inadmissible when primary can be obtained.³⁴ It is sometimes difficult to determine what was the testator's intention, even with the subsequent writings before the court. Where a testator by two codicils altered his will in certain particulars, but in "all other respects" expressly confirmed it, and in a third codicil concluded, "In all other respects I confirm my said will, except as altered by a certain codicil," describing the first codicil, the words of confirmation in the first and third codicils were considered as meaning that the testator did not intend to alter his general testamentary dispositions further than in the particulars mentioned in those codicils; and the devise in the second codicil being clear, it was held

³¹ *Burns v. Burns*, 4 Serg. & R. (Pa.) 295.

³² *Patterson v. Hickey*, 32 Ga. 156; *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460.

³³ *Barker v. Bell*, 49 Ala. 284.

³⁴ *Minor v. Guthrie*, 9 Ky. Law Rep. 113, 4 S. W. 179.

that no intention to revoke it had been shown with sufficient clearness to enable the court to reject it.³⁵

§ 550. Presumption as to Intention to Revoke: Burden of Proof.

In the absence of evidence, mutilations, obliterations, and interlineations are presumed to have been made after the execution of the will,³⁶ and after the date of a codicil which does not refer to them.³⁷ The mere fact that they bear a prior date seems not to rebut this presumption.³⁸

The failure of a testator who is informed of the loss or destruction of his will, to publish another, raises a presumption of intention to revoke it; but this presumption may be rebutted by other evidence, such as the declarations of the testator himself.³⁹ Proof of the manner in which a will was destroyed is not required when it was last in the possession of the testator and can not be found,⁴⁰ the general rule being that if the will can not be found, but may be traced to the testator's hands, it is to be presumed, until the contrary be shown, that it was destroyed by him with the intention to revoke it.⁴¹ The

³⁵ *Follett v. Pettman*, 52 L. J. Ch. 521, 23 Ch. Div. 337.

³⁶ *Christmas v. Whinyates*, 3 Sw. & Tr. 81, 32 L. J. Prob. 73, 9 Jur. N. S. 283; *Cooper v. Bockett*, 4 Moore P. C. C. 419; *Simmons v. Rudall*, 1 Sim. N. S. 115, 15 Jur. 162; *Burgoyne v. Showler*, 1 Rob. Ecc. 5; *In re Thompson*, 3 Notes of Cas. 441; *Gann v. Gregory*, 3 De Gex M. & G. 777; *Doe d. Shallcross v. Palmer*, 16 Q. B. 747; *In re James*, 1 Sw. & Tr. 238; *In re White*, 30 L. J. Prob. 55, 6 Jur.

N. S. 808; *Williams v. Ashton*, 1 Johns. & H. 115.

³⁷ *Lushington v. Onslow*, 6 Notes of Cas. 183; *Rowley v. Merlin*, 6 Jur. N. S. 1165. See, also, *In re Mills*, 11 Jur. 1070.

³⁸ *In re Adamson*, L. R. 3 P. & D. 253.

³⁹ *Steele v. Price*, 5 B. Mon. (44 Ky.) 58.

⁴⁰ *Bulkley v. Redmond*, 2 Bradf. (N. Y.) 281.

⁴¹ *Finch v. Finch*, L. R. 1 P. & D. 371; *In re Shaw*, 1 Sw. & Tr. 62;

same rule prevails where a will in the testator's custody is found in a mutilated condition.⁴² This presumption outweighs a probability of its fraudulent destruction, unsupported by evidence showing more than the existence of an opportunity;⁴³ although, of course, sufficient evidence will overthrow the presumption entirely,⁴⁴ and for this purpose declarations of the deceased are admissible to rebut the presumption of revocation arising from loss or destruction of a will prior to his death.⁴⁵ But this presumption of revocation, from the fact that the will was found mutilated and in the possession of the testator, is not to be rebutted by proof of a conversation held shortly before death with the executor as to fulfilling a bequest made in the will.⁴⁶

Brown v. Brown, 8 El. & B. 876; *Welch v. Phillips*, 1 Moore P. C. C. 299; *Tagart v. Squire*, 1 Curt. 289; *Lillie v. Lillie*, 3 Hagg. Ecc. 184; *Wargent v. Hollings*, 4 Hagg. Ecc. 245; *McBeth v. McBeth*, 11 Ala. 596; *Weeks v. McBeth*, 14 Ala. 474; *Bonds v. Gray*, Ga. Dec. 136, pt. 2; *Lively v. Harwell*, 29 Ga. 509; *Minor v. Guthrie*, 9 Ky. Law 113, 4 S. W. 179; *Kerrigan v. Hart*, 40 Hun (N. Y.) 389; *Hamersley v. Lockman*, 2 Demarest (N. Y.) 524; *Holland v. Ferris*, 2 Bradf. (N. Y.) 334; *Foster's Appeal*, 87 Pa. St. 67, 30 Am. Rep. 340; *Bauskett v. Keitt*, 22 S. C. 187; *Brown v. Brown*, 10 Yerg. (Tenn.) 84; *Appling v. Eades' Admr.*, 1 Grat. (Va.) 286; *Minkler v. Minkler's Estate*, 14 Vt. 125.

⁴² *In re Lewis*, 1 Sw. & Tr. 31; s. c., 27 L. J. Prob. 31; *Williams v. Jones*, 7 Notes of Cas. 106; *Hare*

v. Nasmyth, 3 Hagg. Ecc. 192; *Lambell v. Lambell*, 3 Hagg. 568; *Smock v. Smock*, 11 N. J. Eq. 156.

⁴³ *Bauskett v. Keitt*, 22 S. C. 187. See, also, *Saunders v. Saunders*, 6 Notes of Cas. 518; *Battyll v. Lyles*, 4 Jur. N. S. 718; *In re Gardner*, 1 Sw. & Tr. 109; s. c., 2 L. J. Prob. 55; *In re Ripley*, 1 Sw. & Tr. 68; s. c., 4 Jur. N. S. 342; *In re Pechell*, 6 Jur. N. S. 406; *In re Simpson*, 5 Jur. N. S. 1366; *Eckersley v. Platt*, L. R. 1 P. & D. 281.

⁴⁴ *Foster's Appeal*, 87 Pa. St. 67, 30 Am. Rep. 340.

⁴⁵ *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619.

His declarations are admissible to rebut the presumption, but not to prove the fact of revocation.—See, ante, § —.

⁴⁶ *In re White's Will*, 25 N. J. Eq. 501.

Where the will is in existence and it is necessary to prove intention to revoke, the burden is on the party attempting revocation.⁴⁷ One contesting the probate of a will on the ground that it has been revoked has the burden of proving revocation, and, where the jury is left in doubt on the evidence, he has not sustained the burden.⁴⁸

§ 551. The Same Subject: Lost Wills.

If the will be shown not to have been in the hands of the testator, the presumption that it was destroyed by him or by his direction does not arise, and the burden of proof is upon the party asserting the revocation,⁴⁹ as where it is found mutilated in the custody of one interested in defeating it.⁵⁰ When the intention to revoke has been disproved in regard to a lost will, probate will be granted, and for this purpose its contents may be proven by secondary evidence, draft, copy, or parol testimony.⁵¹ It has even been held that the contents might be established by one interested witness, and that probate might

⁴⁷ Wellborn's Will, 165 N. C. 636, 81 S. E. 1023.

⁴⁸ Aldrich v. Aldrich, 215 Mass. 164, 102 N. E. 487.

⁴⁹ Colvin v. Fraser, 2 Hagg. Ecc. 266, 327; Hildreth v. Schillenger, 10 N. J. Eq. 196; Wynn v. Heveningham, 1 Coll. C. C. 630, 638, 639.

Where subsequent wills, alleged to have revoked a prior will offered for probate, are not found among testator's papers at the time of his death, their disappearance raises a presumption of fact for the jury that testator had destroyed the subsequent wills with the inten-

tion of revoking them.—Aldrich v. Aldrich, 215 Mass. 164, 102 N. E. 487.

⁵⁰ Bennett v. Sherrod, 25 N. C. 303, 40 Am. Dec. 410.

⁵¹ Sugden v. St. Leonards, L. R. 1 Pro. Div. 154; James v. Shrimpton, L. R. 1 Pro. Div. 431; Wood v. Wood, L. R. 1 P. & D. 309; Burls v. Burls, L. R. 1 P. & D. 472; Brown v. Brown, 8 El. & B. 876; Clarkson v. Clarkson, 2 Sw. & Tr. 497; s. c., 31 L. J. Prob. 143; Podmore v. Whatton, 3 Sw. & Tr. 449; s. c., 33 L. J. Prob. 143; Apperson v. Dowdy, 82 Va. 776, 1 S. E. 105.

be granted of so much as the evidence establishes, although the other part remains unknown; and that declarations of the testator whenever made are admissible as evidence of the dispositions made in the undiscovered testament.⁵²

If a last will be lost and its contents can not be ascertained, so that there is no evidence of its having contained an express or implied revocation of a prior will, it will not be presumed that it did so, and the earlier will is entitled to probate.⁵³

§ 552. Revocation Made in Contemplation of a New Disposition.

Cancellation, or tearing, burning, or any destruction of a will, in view of a new disposition which for any cause fails, does not act as a revocation.⁵⁴ Where a testator had executed a holographic will, but on account of

⁵² Sugden v. St. Leonards, L. R. 1 Pro. Div. 154, overruling Quick v. Quick, 3 Sw. & Tr. 442; s. c., 33 L. J. Prob. 146.

⁵³ Hellier v. Hellier, 9 Pro. Div. 237; Caeman v. Van Harke, 33 Kan. 333, 6 Pac. 620; Nelson v. McGiffert, 3 Barb. Ch. (N. Y.) 158; 49 Am. Dec. 170.

⁵⁴ Hyde v. Hyde, 1 Eq. Cas. Abr. 409; s. c., 3 Ch. Rep. 155; Onions v. Tyrer, 1 P. Wms. 343; s. c., Prec. Ch. 459; Burtenshaw v. Gilbert, 2 Cowp. 49; Sutton v. Sutton, 2 Cowp. 812; Winsor v. Pratt, 5 Moore J. B. 484; s. c., 2 Brod. & B. 650; Perrott v. Perrott, 14 East 433, 440. See, also, In re James, 1 Sw. & Tr. 238; Short v. Smith, 4 East 419; Eggleston v. Speke, 3

Mod. 258; Ex parte Ilchester, 7 Ves. Jun. 348; Kirke v. Kirke, 4 Russ. 435; Locke v. James, 11 Mees. & W. 901; Richardson v. Barry, 3 Hagg. Ecc. 249; Scot v. Scot, 1 Sw. & Tr. 258; Clarkson v. Clarkson, 3 Sw. & Tr. 497; s. c., 31 L. J. Prob. 143; Brooke v. Kent, 3 Moore P. C. C. 334; s. c., 1 Notes of Cas. 93, 99; In re Reeve, 13 Jur. 470; Dancer v. Crabb, L. R. 3 P. & D. 98; In re Ibbetson, 2 Curt. 237; Soar v. Dolman, 3 Curt. 121; s. c., 6 Jur. 512.

It has been ruled that a will deliberately canceled or burned, without accident or mistake, is revoked, notwithstanding the testator's intention to make a new one and his failure to do so, or its

its being illegible and containing errors in spelling, he caused it to be copied and attempted to execute the copy which, for want of sufficient witnesses, proved defective, it was decided that the original was entitled to probate, and that, having been destroyed, its contents might be established by a copy upon proof of its correctness and of the testator's declarations.⁵⁵

Where a will is revoked under the mistaken notion that a previous will is thereby revived, the revocation does not take effect.⁵⁶ So, too, obliterations and interlineations are inoperative if made in view of a different disposition which fails for want of proper attestation, and the instrument will have the same force as before;⁵⁷ but the mere intention to make a new will, at some definite future time, is not enough to prevent such acts from having a revoking effect.⁵⁸

§ 553. The Same Subject.

A will is not revoked by a later instrument which does not in express terms revoke it, and which never became operative because of not being found.⁵⁹ An instrument intended to be a will, but failing to take effect on account

failure to take effect.—Semmes v. Semmes, 7 Har. & J. (Md.) 388; Ranks v. Banks, 65 Mo. 432.

55 Wilbourn v. Shell, 59 Miss. 205, 42 Am. Rep. 363.

56 Powell v. Powell, L. R. 1 P. & D. 209, overruling Rickensin v. Swatman, 4 Sw. & Tr. 205; s. c., 30 L. J. Prob. 84. See, also, Pringle v. McPherson's Exrs., 2 Brev. (S. C.) 279, 3 Am. Dec. 713.

57 Kirke v. Kirke, 4 Russ. 435; Locke v. James, 11 Mees. & W.

901; Short v. Smith, 4 East 419; In re Parr, 29 L. J. Prob. 70; s. c., 6 Jur. N. S. 56; In re Harris, 1 Sw. & Tr. 536; Hale v. Tokelove, 2 Rob. Ecc. 318; In re McCabe, L. R. 3 P. & D. 94.

Contra: In re Bedford, 5 Notes of Cas. 188.

58 Williams v. Tyley, John. 530; s. c., 5 Jur. N. S. 35; In re Mitchell, 32 L. J. Prob. 202.

59 Peck's Appeal, 50 Conn. 562, 47 Am. Rep. 685.

of some defect of structure or informality of execution, can not, even by express words, revoke a former will, because it can not be known that the testator intended to revoke the first except for the purpose of substituting the second.⁶⁰ An inconsistent codicil which fails for uncertainty does not work a revocation.⁶¹ But if the second devise fails from the incapacity of the devisee and not through any defect in the instrument, the prior devise is revoked.⁶² So, also, a codicil which makes a different disposition of property from the will, if invalid for some cause *dehors* the instrument, although it contains no express clause of revocation, is effectual to revoke.⁶³ An express revocation will have its effect where the object for which it was made fails as being against public policy.⁶⁴ If the second instrument state the grounds upon which the revocation is made to be circumstances which do not in fact exist, as, speaking of the devisees, "they being all dead," when such is not the case, the revocation is ineffective;⁶⁵ but the rule is different where not

⁶⁰ Hollingshead v. Sturgis, 21 La. Ann. 450; Laughton v. Atkins, 1 Pick. (Mass.) 535, 543; Hairston v. Hairston, 30 Misc. 276; Pringle v. McPherson's Exrs., 2 Brev. (S. C.) 279, 3 Am. Dec. 713; Barksdale v. Barksdale, 12 Leigh (Va.) 535.

⁶¹ Carpenter v. Miller's Exrs., 3 W. Va. 174, 100 Am. Dec. 744.

⁶² Roper v. Constable, 2 Eq. Cas. Abr. 359, pl. 9; s. c., sub nom. Roper v. Radcliffe, 10 Mod. 233; Tupper v. Tupper, 1 Kay & J. 665; Quinn v. Butler, L. R. 6 Eq. 225; In re Gentry, L. R. 3 P. & D. 80; Hairston v. Hairston, 30 Miss. 276.

Contra: Pringle v. McPherson's Exrs., 2 Brev. (S. C.) 279; 3 Am. Dec. 713.

⁶³ Read v. Manning, 30 Miss. 308; Snowhill v. Snowhill, 23 N. J. L. 447.

⁶⁴ Gossett v. Weatherly, 58 N. C. 46.

⁶⁵ Campbell v. French, 3 Ves. 321; Doe d. Evans v. Evans, 2 Perry & D. 378; Barclay v. Maskelyne, John. 124; Allen v. Bewsey, 7 Ch. Div. 453, 464.

See, also, Powell v. Mouchett, 6 Madd. 216; In re Oswald, L. R. 3 P. & D. 162.

The contrary was held where

the fact itself, but the belief or information of the fact, is stated to be the reason.⁶⁶

A revocation clause in a will that fails may yet operate to avoid a former will, if it appear that such was the testator's intention in any event.⁶⁷ In the contest of a will on the ground of revocation, a subsequent will to which probate has been refused can not be offered in evidence.⁶⁸

§ 554. General Effect of Revocation.

If there be a bequest to several persons as tenants in common, and by codicil the bequest to one of them is revoked, his share will not accrue to the others.⁶⁹ "But if the testator revoke so much of his will as contains the gift to one of such persons, here, if the words that remain are sensible *per se*, and amount without further alteration to a gift of the whole subject to the others, these will take the whole, the will being read as if the revoked words had never been in it."⁷⁰ In the absence of any evidence of an intention to the contrary, property disposed of by an item which has been erased by the testator passes under the general residuary clause.⁷¹ If

the reason assigned was that other provision had been made for the legatee.—Hayes' Exrs. v. Hayes, 21 N. J. Eq. 265.

⁶⁶ Attorney General v. Lloyd, 3 Atk. 552; Newton v. Newton, 12 Ir. Ch. 118; Attorney General v. Ward, 3 Ves. Jun. 327; Skipwith v. Cahell's Exr., 19 Grat. (Va.) 758.

Contra: Thomas v. Howell, L. R. 18 Ex. 198, 209.

⁶⁷ Barksdale v. Hopkins, 23 Ga. 332.

⁶⁸ Stickney v. Hammond, 138 Mass. 116.

⁶⁹ Cresswell v. Cheslyn, 2 Eden 123; Humble v. Shore, 7 Hare 247. See, also, Shaw v. McMahon, 4 Dru. & War. 431.

⁷⁰ Harris v. Davis, 1 Colly. 416. See, also, Sykes v. Sykes, L. R. 4 Eq. 200.

⁷¹ Bigelow v. Gillott, 123 Mass. 102, 25 Am. Rep. 32.

the testator destroy the will, and a codicil thereto is found among his papers, the presumption is that the codicil also was revoked,⁷² unless a contrary intention can be gathered from the codicil itself, or from extrinsic evidence.

§ 555. Will Revoked by Subsequent Will Not Revived by Revocation of Latter: English Rule.

Prior to the statute of 1 Victoria, ch. 26, the English common law courts held that the revocation of a will expressly revoking a previous will worked a revival thereof,⁷³ while the ecclesiastical courts held that whether there was a revival or not was a question of intention and of fact.⁷⁴ The matter is now settled in England by statutory provision that a former will or codicil or part thereof which shall be in any manner revoked, can not be revived by the revocation of the revoking will;⁷⁵ and it is immaterial whether the later instrument contained express words of revocation, or was merely inconsistent with the earlier will.⁷⁶

⁷² *Usticke v. Bawden*, 2 Addams Ecc. 116; *In re Halliwell*, 4 Notes of Cas. 400; *Clogstoun v. Walcott*, 5 Notes of Cas. 623; *Grimwood v. Cozens*, 2 Sw. & Tr. 364; *In re Dutton*, 3 Sw. & Tr. 66.

Contra: *Sugden v. St. Leonards*, 1 Pro. Div. 154, 206; *In re Turner*, L. R. 2 P. & D. 403; *Medlycott v. Assheton*, 2 Addams Ecc. 229; *Coppin v. Dillon*, 4 Hagg. Ecc. 361, 369.

⁷³ *Randall v. Beatty*, 31 N. J. Eq. 643. See, also, *Goodright v. Glazier*, 4 Burr. 2512; *Rainier v. Rainier*, 1 Jur. 754; *Harwood v. Goodright*, 1 Cowp. 87, 92.

⁷⁴ *Usticke v. Bawden*, 2 Addams Ecc. 116; *Moore v. Moore*, 1 Philim. 406, 412; *James v. Cohen*, 3 Curt. 770; s. c., 8 Jur. 249. See, also, *Boudinot v. Bradford*, 2 Dall. (U. S.) 266, 1 L. Ed. 375; *Lawson v. Morrison*, 2 Dall. (U. S.) 286, 1 L. Ed. 384; *Barksdale v. Hopkins*, 23 Ga. 332.

⁷⁵ Statute of 1 Victoria, ch. 26, § 22.

⁷⁶ *Brown v. Brown*, 8 El. & B. 876; *Hale v. Tokelove*, 2 Rob. Ecc. 318; *Boulcott v. Boulcott*, 2 Drew. 25; *Major v. Williams*, 3 Curt. 432;

§ 556. The Same Subject: Rule in the United States: Conflicting Decisions.

In the United States the authorities are in conflict. The methods of revocation have been distinguished. Burning or totally destroying is a present act and the revocation is immediately effective.⁷⁷ A will may also be revoked by another will, either with or without special words of revocation, or by some writing executed with the formalities of a will, declaring a revocation. It is held by one line of authorities that these two methods last mentioned differ materially in that the former relates to a will while the latter does not. One looks toward the future while the other regards the present. The writing declaratory of an intention to revoke is evidence of a present intention, and when executed becomes, of itself, a complete revocation; but the revocation by will takes effect only when the will of which it forms a part becomes effective, and that can never be in the lifetime of the testator.⁷⁸ That if revocation, either in whole or in part, is to be implied from the execution of a second will, this revocation does not become effective if the second will is destroyed or revoked before probate, for

s. c., sub nom. *Major v. Iles*, 7 Jur. 219.

⁷⁷ If a will be revoked by destruction, as by burning, and a second one is executed in its place, there is nothing to revive upon the destruction or revocation of the second one.—*Blackett v. Ziegler*, 153 Iowa 344, Ann. Cas. 1913E, 115, 37 L. R. A. (N. S.) 291, 133 N. W. 901.

⁷⁸ *Moore v. Rowlett*, 269 Ill. 88, Ann. Cas. 1916E, 718, 109 N. E. 682.

Under the Georgia Code an express revocation "takes effect instantly, or independent of the validity or ultimate fate of the will, or other instrument containing it"; a resulting revocation "takes effect only when the subsequent inconsistent will becomes effectual, and hence, if from any cause it fails, the revocation is not completed."—*Harwell v. Lively*, 30 Ga. 315, 76 Am. Dec. 649.

the reason that every will, as such, is ambulatory in character, and if not in existence at the time of testator's death, and there being nothing to probate except the original will, there is no inconsistency and no revocation by implication.⁷⁹ But some of the courts go beyond this and hold that a former will, although in express terms revoked by a subsequent will, is revived by a revocation of the latter.⁸⁰

§ 557. The Same Subject.

In Michigan a will is not revived by the destruction of a subsequent will, when the latter or any intermediate will has contained a clause revoking all former wills.⁸¹ In Massachusetts, although the cancellation of a will, which expressly revoked former wills, does not of itself revive a previously made existing will, yet subsequent declarations of the testator are admissible to show an intention to revive the former.⁸² In New York a prior

⁷⁹ Where a testator executed a second will, supposing at the time that his first was lost, and afterwards finding the first, declaring that he preferred it to the second, destroyed the latter, it was held that the second will might be properly admitted to probate.—*Marsh v. Marsh*, 48 N. C. 77, 64 Am. Dec. 598.

⁸⁰ *Appeal of Peck*, 50 Conn. 562, 47 Am. Rep. 685; *Blakeman v. Sears*, 74 Conn. 516, 51 Atl. 517; *Stetson v. Stetson*, 200 Ill. 601, 607, 61 L. R. A. 258, 66 N. E. 262; *Moore v. Rowlett*, 269 Ill. 88, Ann. Cas. 1916E, 718, 109 N. E. 682; *Randall v. Beatty*, 31 N. J. Eq. 643; *In re Diamant's Estate*, 84 N. J. Eq. 135,

92 Atl. 952; *Flintham v. Bradford*, 10 Pa. St. 82, 90. See, also, *Taylor v. Taylor*, 2 Nott & McC. (S. C.) 482.

⁸¹ *Scott v. Fink*, 45 Mich. 241, 7 N. W. 799.

⁸² *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322. See, also, *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650; *Beaumont v. Keim*, 50 Mo. 28.

An instrument, executed at the same time or after the destruction of a second will containing an express revocation clause, directed to the judge of the district court of the county, and requesting in case of testator's death to appoint a certain person as administrator

will is not revived by the revocation of a later will, even though the latter in terms revoked the prior will,⁸³ and this rule is sustained by the weight of authority.⁸⁴ In

without bond, could not operate as a revival of a first will not showing any intent to that effect.—*Blackett v. Ziegler*, 153 Iowa 344, *Ann. Cas.* 1913E, 115, 37 *L. R. A.* (N. S.) 291, 133 N. W. 901.

⁸³ *In re Angus*, 3 *Demarest* (N. Y.) 93, 95; *In re Wylie's Will*, 162 App. Div. 574, 145 N. Y. Supp. 133. But see *In re Simpson*, 56 *How. Pr.* (N. Y.) 125.

The point is made for the proponents that in order to revoke a will, it is not sufficient that the existence of a subsequent will should have been found by the jury; but it must be found different from the former, with the nature of the difference. The proposition is not correct. One of the ways of revoking a will is by making a subsequent one. *Rev. Code*, § 1932.—*Barker v. Bell*, 49 Ala. 284; *Bruce v. Sierra*, 175 Ala. 517, *Ann. Cas.* 1914D, 125, 57 So. 709.

Where a codicil revokes a will pro tanto by adding an additional legacy before creating the residuary estate, the subsequent revocation of the codicil does not have the effect of restoring the will to its original form.—*Osburn v. Rochester Trust and Safe Deposit Co.*, 209 N. Y. 54, *Ann. Cas.* 1915A, 101, 46 *L. R. A.* (N. S.) 983, 102 N. E. 571.

⁸⁴ *Brown v. Brown*, 8 El. & Bl.

876, 92 El. C. L. 876; *Blackett v. Ziegler*, 153 Iowa 344, *Ann. Cas.* 1913E, 115, 37 *L. R. A.* (N. S.) 291, 133 N. W. 901; *Stevens v. Hope*, 52 Mich. 65, 17 N. W. 698; *Cheever v. North*, 106 Mich. 390, 58 *Am. St. Rep.* 499, 37 *L. R. A.* 561, 64 N. W. 455; *In re Cunningham*, 38 Minn. 169, 8 *Am. St. Rep.* 650, 36 N. W. 269; *Marsh v. Marsh*, 48 N. C. 77, 64 *Am. Dec.* 598; *Matter of Barnes' Will*, 70 App. Div. 523, 75 N. Y. Supp. 373.

If the mere execution of the subsequent instrument ipso facto worked a revocation and cancellation of all former wills, its destruction could not have been effective to revive such former will, as the act of revocation would have been completed and consummated when the instrument was executed and would have operated instantaneously to absolutely revoke such former will.—*Blackett v. Ziegler*, 153 Iowa 344, *Ann. Cas.* 1913E, 115, 37 *L. R. A.* (N. S.) 291, 133 N. W. 901; *Moore v. Rowlett*, 269 Ill. 88, *Ann. Cas.* 1916E, 718, 109 N. E. 682; *Bates v. Hacking*, 28 R. I. 523, 125 *Am. St. Rep.* 759, 14 *L. R. A.* (N. S.) 937, 68 Atl. 622; *In re Noon*, 115 Wis. 299, 95 *Am. St. Rep.* 944, 91 N. W. 670.

A contestant of a will, who shows its revocation by the execution of an instrument in the form prescribed by *Rev. Laws, Mass.*,

Mississippi it was held at an early day that if a will is revoked either expressly or by implication, "it is gone forever," without some express act to revive or adopt it.⁸⁵ It is provided by statute in some states that the revocation of a subsequent will does not revive an earlier one, unless an intention to do so appear in the revoking instrument. Provisions of this nature have been enacted in Alabama, Missouri, Arkansas, New York, Ohio, Indiana, Kansas, California, Oregon, Nevada, North Dakota, South Dakota, Montana, Utah, and New Mexico.⁸⁶ The general rule seems to be that where the revocation of the first will is only to be implied from the inconsistent dispositions of the second, there is in fact no revocation until the death of the testator renders the second instrument effective; and if at any time the testator destroys the later will, the earlier will takes effect at his death, as though the second instrument had never existed.⁸⁷ There is good reason and authority, however, in holding it to be a question of the testator's intent, and whether or not the earlier will is revived under the circumstances just mentioned should be determined upon the facts and permissible parol testimony.⁸⁸ But where

ch. 135, § 8, authorizing the revocation of a will by a writing signed, attested, and subscribed in the same manner as a will, need not prove the provisions of a later will, which could not be offered for probate.—*Aldrich v. Aldrich*, 215 Mass. 164, 102 N. E. 487.

⁸⁵ *Bohanon v. Walcott*, 2 Miss. (1 How.) 336, 29 Am. Dec. 631.

⁸⁶ *Stimson's Am. Stat. Law*, § 2679.

See synopsis of statutes, Appendix, this volume.

⁸⁷ *Goodright v. Glazier*, 4 Burr. 2512; *Colvin v. Warford*, 20 Md. 357, 391.

⁸⁸ "There is no danger, then, it seems to us, in holding it to be a question of testator's intent, to be arrived at from all the circumstances in the case. Testimony to establish such intent could only come from disinterested witnesses, and we can perceive of no harm which would result in submitting such question as one of fact. In the construction of wills, testator's

there are express words of revocation, the act of revocation is consummated in the testator's lifetime; it is a complete and conclusive act, without regard to the testamentary provisions of the will containing it, and the destruction of the subsequent instrument does not act as a revival of the first,⁸⁹ without "republication or some express declaration of the testator that he would have the first operate as his will."⁹⁰

§ 558. Alterations and Interlineations: Presumed to Have Been Made After Execution.

One dominant feature of the law of wills is that the testator has the right to change the testamentary dispositions he has made, provided he does so in the man-

intent has always been regarded as controlling, and so with reference to what should be regarded as his will. There can be no valid objection to a rule leaving the question of revivor in such cases as this to be found as a matter of intent upon permissible parol testimony.—*Blackett v. Ziegler*, 152 Iowa 344, Ann. Cas. 1913E, 115, 37 L. R. A. (N. S.) 291, 133 N. W. 90.

⁸⁹ *Burtenshaw v. Gilbert*, 1 Cowp. 49; *Brown v. Brown*, 92 Eng. C. L. R. 875; *Boudinot v. Bradford*, 2 Dall. (U. S.) 266, 1 L. Ed. 375; *James v. Marvin*, 3 Conn. 576; *Colvin v. Warford*, 20 Md. 357; *Rudisill's Exr. v. Rodes*, 29 Grat. (Va.) 147.

Contra: *Harwood v. Goodright*, 1 Cowp. 87; *Goodright v. Glazier*, 4 Burr. 2512.

⁹⁰ *Moore v. Moore*, 1 Phillim. 406.

Where subsequent wills, alleged to have revoked a prior will offered for probate, are not found among testator's papers at the time of his death, his declaration, identifying the prior will as the one he wanted and the one which he had requested his counsel to procure for him, is competent on the issue of intention to destroy the subsequent wills and revive the prior will as his final will.—*Aldrich v. Aldrich*, 215 Mass. 164, 102 N. E. 487.

Under the New York law destruction of a subsequent will which revokes a prior, will not revive the prior will in the absence of evidence showing such intention.—*In re Kuntz's Will*, 163 App. Div. 125, 148 N. Y. Supp. 382.

ner sanctioned by statute. If he re-executes his will, its validity can not be attacked because the dispositions have been changed. Wills, however, often bear on their faces the marks of obliteration, alteration, and interlineation, sometimes so mutilating the former writing that it can not be deciphered. Where such changes appear on the face of a will the presumption is that they were made subsequent to execution.⁹¹ This presumption, however, may be rebutted by extrinsic evidence.⁹²

⁹¹ *Cooper v. Bockett*, 4 Moore P. C. C. 419; *Greville v. Tylee*, 7 Moore P. C. C. 320; *Burgoyne v. Showler*, 1 Rob. Ecc. 5; *Wetmore v. Carryl*, 5 Redf. (N. Y.) 544.

Contra: *Wikoff's Appeal*, 15 Pa. St. 281, 53 Am. Dec. 597.

Where a codicil to the will takes no notice of the changes or interlineations, the presumption is that the changes were subsequent to the codicil.—*Lushington v. Onslow*, 6 Notes of Cas. 183; *Rowley v. Merlin*, 6 Jur. N. S. 1165.

⁹² *Martin v. King*, 72 Ala. 354; *Burge v. Hamilton*, 72 Ga. 568; *Southworth v. Southworth*, 173 Mo. 59, 73 S. W. 129.

Interlineations and alterations are sometimes distinguished, it being held that an interlineation in general harmony with the context, is more likely to have taken place before execution than an alteration.—*Smith v. Runkle*, (N. J. Prerog.) 97 Atl. 296, affirmed, (N. J.) 98 Atl. 1086; *Godley v. Smith*, (N. J.) 98 Atl. 1085; *Smith v. Scholfield*, (N. J.) 98 Atl. 1087.

Declarations of the testator,

whether made before or at the time of the execution of his will, are admissible as tending to show when the alterations were made.—*Doe d. Shallcross v. Palmer*, 16 Q. B. 747; *In re Sykes*, L. R. 3 P. & D. 26; *Dench v. Dench*, L. R. 2 Pro. Div. 60.

But declarations made subsequent to the execution of the will are inadmissible for such purpose.—*Doe d. Shallcross v. Palmer*, 16 Q. B. 747.

The holographic will of an unlettered man is to be considered in the light of his illiteracy in determining whether alterations therein were made before or after execution.—*In re Woods' Will*, 144 App. Div. 259, 129 N. Y. Supp. 5.

The testator signed the will and afterwards an interlineation was inserted to add a bequest. The will was then published and the signature acknowledged in the presence of the witnesses, who thereupon subscribed their names as witnesses in the presence of the testator. It was urged that the testator never subscribed his

Where mere blank spaces have been filled in, such are not considered as alterations, and this would apply where the name of a beneficiary was interlined in the same ink as the document, it being in effect no more than the filling in of a blank.⁹³ But if blanks are filled in with different inks, those in the ink in which the will was written or executed are presumed to have been prepared prior to signing, the others afterward.⁹⁴ The safest procedure is to initial all interlineations or alterations appearing in the will at the time of execution and to refer to the same in the attestation clause.⁹⁵

§ 559. The Same Subject: As to Revocation.

A will duly executed is not revoked by the fact that the testator makes interlineations on its face or attempts to alter the will by crossing out or erasing certain clauses, irrespective of the effect which such acts may have had upon the particular portion of the will in question.⁹⁶ The rule under the Statute of Frauds was that the scratching out by the testator of a clause in a will was a revocation of that particular clause.⁹⁷ This rule,

name to the will as pleaded before the court. Held that his acknowledgment of his own signature amounted to a signing.—In re Bullifant's Will, 82 N. J. Eq. 340, Ann. Cas. 1915C, 72, 51 L. R. A. (N. S.) 169, 88 Atl. 1093.

⁹³ In re Cadage, L. R. 1 P. & D. 543.

⁹⁴ Birch v. Birch, 6 Notes of Cas. 581.

⁹⁵ Wright v. Wright, 5 Ind. 389; Matter of Voorhees' Will, 6 Demarest (N. Y.) 162, 13 N. Y. St. Rep. 183.

⁹⁶ Goods of Woodward, L. R. 2 P. & D. 206; Wolf v. Bollinger, 62 Ill. 368; Wells v. Wells, 4 T. B. Mon. (20 Ky.) 152, 16 Am. Dec. 150; Wheeler v. Bent, 7 Pick. (Mass.) 61; Matter of Prescott, 4 Redf. (N. Y.) 178; Clark v. Smith, 34 Barb. (N. Y.) 140; In re Dixon's Appeal, 55 Pa. St. 424; Cogbill v. Cogbill, 2 Hen. & M. (Va.) 467.

⁹⁷ Short v. Smith, 4 East 419; Francis v. Grover, 5 Hare 39; Martins v. Gardiner, 8 Sim. 73.

While the intention to revoke a will as a whole may be evi-

under a similar statute, has been followed in the United States.⁹⁸ Cancellation, however, must be complete; the partial obliteration of a devise is of no consequence unless so obliterated as to amount in law to a revocation.⁹⁹ Likewise, immaterial alterations do not amount to a revocation.¹ The revocation of a portion of a will by scratching out the same is not allowed where the effect of the cancellation of such particular portion would cause a change in other dispositions made, such as adding to some devise or legacy. This, in effect, would be creating a new devise or bequest which could be accomplished only by republication or the execution of a new will.²

§ 560. The Same Subject: Alterations Disregarded: Original Will Deciphered If Possible.

Under the statute of 1 Victoria, ch. 26, and by statute in some of the states of the United States, a will can not be

denced by its destruction or obliteration, it has been held that this rule does not apply to an attempt to revoke only a portion of the will.—*Gugel v. Vollmer*, 1 Dem. Sur. (N. Y.) 484; *Matter of Aker's Will*, 74 App. Div. 461, 77 N. Y. Supp. 643; *Burnham v. Cromfort*, 108 N. Y. 535, 2 Am. St. Rep. 462, 15 N. E. 710; *Matter of Curtis' Will*, 135 App. Div. 745, 119 N. Y. Supp. 1004; *Matter of Van Woert's Will*, 147 App. Div. 483, 131 N. Y. Supp. 748.

⁹⁸ *In re Brown's Will*, 1 B. Mon. (40 Ky.) 56, 35 Am. Dec. 174; *Wells v. Wells*, 4 T. B. Mon. (20 Ky.) 152, 154, 16 Am. Dec. 150; *Bigelow v. Gillott*, 123 Mass. 102,

25 Am. Rep. 32; *In re Kirkpatrick's Will*, 22 N. J. Eq. 463.

⁹⁹ *Clark v. Smith*, 34 Barb. (N. Y.) 140.

A will may be partially revoked by the cancelation or tearing of the part revoked.—*Barfield v. Carr*, 169 N. C. 574, 86 S. E. 498.

¹ *McIntire v. McIntire*, 162 U. S. 383, 40 L. Ed. 1009, 16 Sup. Ct. 814.

² *Locke v. James*, 11 M. & W. 901; *Wolf v. Bollinger*, 62 Ill. 368; *Doane v. Hadlock*, 42 Me. 72, 75; *Eschbach v. Collins*, 61 Md. 478, 48 Am. Rep. 123; *Pringle v. McPherson's Exrs.*, 2 Brev. (S. C.) 279, 3 Am. Dec. 713.

altered except by another will or codicil executed with all the formalities required for execution of wills, or without authenticating such alteration by a new attestation in the presence of the witnesses, or other form required by statute.³ The general rule may be stated that no obliteration, addition, interlineation, or alteration of or to any portion of a will, made by the testator subsequent to the execution of the instrument, is effective to alter the dispositions originally made provided the will as it originally stood can be deciphered, or, with the aid of extrinsic evidence, can be supplied.⁴ If it is impossible

³ *Greville v. Tylee*, 7 Moore P. C. C. 320; *Goods of Blewitt*, L. R. 5 Pro. Div. 116; *Wolf v. Bollinger*, 62 Ill. 368; *Matter of Prescott*, 4 Redf. (N. Y.) 178; *Lovell v. Quitman*, 88 N. Y. 377, 42 Am. Rep. 254.

The statute of 1 Victoria, ch. 26, § 21, provides: "That no obliteration, interlineation, or other alteration made in any will, after the execution thereof, shall be valid or have any effect except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such

alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

⁴ *Goods of Adamson*, L. R. 3 P. & D. 253; *Goods of Parr*, 29 L. J. Prob. 70; *Goods of Harris*, 29 L. J. Prob. 79; *Goods of Hardy*, 30 L. J. Prob. 142; *Wolf v. Bollinger*, 62 Ill. 368; *Doane v. Hadlock*, 42 Me. 72, 75; *In re Penniman's Will*, 20 Minn. 245, 18 Am. Rep. 368; *Thomas v. Thomas*, 76 Minn. 237, 77 Am. St. Rep. 639, 79 N. W. 104; *Wetmore v. Carryl*, 5 Redf. (N. Y.) 544; *Jackson v. Holloway*, 7 Johns. (N. Y.) 394, 395; *In re Lang's Will*, 9 Misc. Rep. (N. Y.) 521, 30 N. Y. Supp. 388; *Matter of Ackerman's Will*, 129 App. Div. 584, 114 N. Y. Supp. 197; *Matter of Curtis' Will*, 135 App. Div. 745, 119 N. Y. Supp. 1004; *In re Woods' Will*, 144 App. Div. 259, 129 N. Y. Supp. 5; *Bethell v. Moore*, 19 N. C.

to decipher or supply the portions obliterated, interlineations will be disregarded and the portion which has been so erased will be considered as blank.⁵ All provisions added to a will subsequent to execution without republication or according to the statutory formalities, are void and are disregarded, the will being probated as originally executed.⁶

§ 561. The Same Subject: When Made by a Stranger, or Interested Party.

Alterations, interlineations, and the like, made by a stranger without the knowledge or consent of the testator, must be wholly disregarded and have no effect on the will as it originally stood.⁷ If made by a beneficiary under the will, the benefits accruing to others should not be affected. He can not destroy such dispo-

311, 316; *In re Dixon's Appeal*, 55 Pa. St. 424; *Stover v. Kendall*, 1 Coldw. (41 Tenn.) 557.

⁵ *In re Ibbetson*, 2 Curt. 337; *Townley v. Watson*, 3 Curt. 761; *Doherty v. Doherty*, L. R. 25 Ir. Prob. 297; *In re Wilcox's Will*, 20 N. Y. Supp. 131.

⁶ *Goods of White*, 30 L. J. Prob. 55; *Stevens v. Stevens*, 6 Demarest (N. Y.) 262, 3 N. Y. Supp. 131, 17 N. Y. St. Rep. 785.

A will can be altered only in the manner prescribed by law, and in general the instrument as altered must be executed anew. Where the word "canceled" was written across the fourth paragraph of the will, which had diagonal lines drawn across it, and

the fifth paragraph was followed by a cross with a circle around it, which was evidently intended to refer to an addition following the attestation clause, the will was entitled to probate, as it was of the date of its original execution, ignoring the attempted modification.—*In re Hildenbrand's Will*, 87 Misc. Rep. 471, 150 N. Y. Supp. 1067.

⁷ *Smith v. Fenner*, 1 Gall. (U.S.) 170, Fed. Cas. No. 13046; *Doane v. Hadlock*, 42 Me. 72; *Thomas v. Thomas*, 76 Minn. 237, 77 Am. St. Rep. 639, 79 N. W. 104; *Monroe v. Huddart*, 79 Neb. 569, 14 L. R. A. (N. S.) 259, 113 N. W. 149; *Malin v. Malin*, 1 Wend. (N. Y.) 625; *Holman v. Riddle*, 8 Ohio St. 384.

sitions made by the testator, neither can he add to or take from them. If he alters a devise or bequest to himself, such act is to the prejudice of the despoiler; the alteration as made can not be allowed and the original benefit to himself should be declared void. But other provisions in his favor which he does not attempt to change are unaffected.⁸

⁸ *Smith v. Fenner*, 1 Gall. (U.S.) *Hadlock*, 42 Me. 72; *In re Wilson*, 170, Fed. Cas. No. 13096; *Doane v.* 8 Wis. 171.

CHAPTER XXI.

REPUBLICATION OF WILLS.

- § 562. Republication: Meaning of the term.
- § 563. Republication as affected by statute: English rule.
- § 564. Republication generally accomplished only by re-execution with all formalities.
- § 565. Republication of will by codicil.
- § 566. Codicil need not be attached to will, but must refer to and identify it.
- § 567. The same subject: Presence of will and formal declaration unnecessary.
- § 568. Effect of republication by codicil: Intervening codicils.
- § 569. The same subject: Unexecuted codicils.
- § 570. Effect of republication.
- § 571. The same subject.
- § 572. Defective execution of will cured by codicil.

§ 562. Republication: Meaning of the Term.

Republication as applied to wills has reference to those acts performed by the testator to revive or give validity as his will to an instrument formerly executed by him as his will and thereafter revoked, or invalid in the first instance for want of proper execution. The dispositions made by the testator in his former will may be given validity by the due execution of a new will containing the same provisions or by the execution of a new instrument incorporating in itself such former will. The term "republication" was applicable under the early rule of the common law when wills could be revived by acts or oral declarations of the testator whereby he repub-

lished the fact that the instrument was intended as his last will, but under modern statutes and rulings, re-execution would be a more applicable term. The word, however, is used and understood to mean a revival of a former instrument as a will by legal methods. It does not include a new publication or declaration by the testator of the instrument as his last will, in those jurisdictions where publication is not required.

§ 563. Republication as Affected by Statute: English Rule.

Under the Statute of Frauds, 29 Charles II, ch. 3, sec. 5, a devise of lands could be republished only by re-execution in the presence of three witnesses or by a codicil executed according to the formalities required by the statute. The Statute of Frauds, however, affected only real property. Wills of personalty, other than nuncupative wills, had to be in writing, but no formalities of execution were demanded. The same was true of wills of real property after the passage of the wills acts of 32 Henry VIII, ch. 1, and of 34 and 35 Henry VIII, ch. 5, and before the Statute of Frauds. Such a will, not requiring formalities of execution, if for any cause revoked, could be revived by the acts or parol declarations of the testator. Almost any act or declaration of the testator showing that the instrument was intended by him as his will, was sufficient.¹

The statute of 1 Victoria, ch. 26, applying to wills of both real and personal property, eliminated oral republication, the act requiring "that no will or codicil or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or

¹ Long v. Aldred, 3 Addams Ecc. 209; Brotherton v. Hellier, 2 Cas. 48; Miller v. Brown, 2 Hagg. Ecc. Temp. Lee 55.

by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterward wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown." Therefore the rule now in England is that republication can be accomplished only by re-execution.

§ 564. Republication Generally Accomplished Only by Re-execution With All Formalities.

The rule in most states of the Union is that a will that has once been revoked can be republished or revived only by re-execution, according to all the formalities required by the statute.² Parol republication has been allowed in Pennsylvania where, except as to charitable devises, wills may be proved by parol on the oath of witnesses, whether they attested the execution or not. It was therefore said that no greater proof could be required of republication.³ But where witnesses must at-

² *Barker v. Bell*, 46 Ala. 216; *Witter v. Mott*, 2 Conn. 67; *Carey v. Baughn*, 36 Iowa 540, 14 Am. Rep. 534; *Sanders v. Babbitt*, 106 Ky. 646, 51 S. W. 163; *In re Penman's Will*, 20 Minn. 245, 18 Am. Rep. 368; *Jackson v. Potter*, 9 Johns. (N. Y.) 312; *Brown v. Clark*, 77 N. Y. 369; *Love v. Johnston*, 34 N. C. 355; *Warner v. Warner's Estate*, 37 Vt. 356.

³ *Jones v. Hartley*, 2 Whart. (Pa.) 103; *Havard v. Davis*, 2 Binney (Pa.) 406; *Jack v. Shoenberger*, 22 Pa. St. 416.

Oral declaration of the testator in the presence of two witnesses being sufficient for a valid publication of a will, is also sufficient for the republication of a revoked will, the same evidence being required in one case as in the other.—*In re Simpson*, 56 How. Pr. (N. Y.) 125; *Musser v. Curry*, 3 Wash. C. C. (U. S.) 481, Fed. Cas. No. 9973. See, also, *In re Dewell*, 17 Jur. 1130.

It has been held sufficient if the testator call witnesses to the

test and subscribe their names to the will as witnesses, the general rule is that republication can be accomplished by that method only, and can not be proved by parol.⁴ Where a will was found with the signature cut off and gummed on again it was not considered a valid re-execution.⁵ Nor was her husband's will republished where the wife carefully collected the fragments and sewed them together.⁶

§ 565. Republication of Will by Codicil.

A codicil referring to a will operates as a republication thereof, and the two are to be regarded as one instrument speaking from the date of the codicil.⁷ There is

republication, declaring that the paper contains his last will, and having the fact indorsed on the will and signed by the witnesses only.—*Reynolds' Lessee v. Shirley*, 7 Ohio 39, pt. II.

⁴ *Witter v. Mott*, 2 Conn. 67; *Jackson v. Potter*, 9 Johns. (N. Y.) 312; *Sawyer's Legatees v. Sawyer's Heirs*, 52 N. C. 134; *Battle v. Speight*, 32 N. C. 459; *Love v. Johnston*, 34 N. C. 355; *Wallace v. Blair*, 1 Grant Cas. (Pa.) 75; *Jones v. Hartley*, 2 Whart. (Pa.) 103.

Where a will which revoked a prior will was destroyed and the prior will republished in the presence of only one witness, the republication is insufficient.—In *re Kuntz's Will*, 163 App. Div. 125, 148 N. Y. Supp. 382.

⁵ *Bell v. Fothergill*, L. R. 2 P. & D. 148.

⁶ *Sweet v. Sweet*, 1 Redf. (N. Y.) 451.

⁷ *Payne v. Payne*, 18 Cal. 291; *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360; *Murray v. Oliver*, 41 N. C. 55; *Rose v. Drayton*, 4 Rich. Eq. (S. C.) 260; *Stover v. Kendall*, 1 Coldw. (41 Tenn.) 557.

The effect of the revival of a revoked will by the execution of a codicil, is to revive it as of the date of the codicil.—*Estate of Cutting*, 172 Cal. 191, 155 Pac. 1002.

A will expressly revoked by a subsequent instrument may be revived by its re-execution, or by a codicil executed pursuant to statute, showing an intention to revive it.—*Blackett v. Ziegler*, 153 Iowa 344, Ann. Cas. 1913E, 115, 37 L. R. A. (N. S.) 291, 133 N. W. 901.

The will opened with a recital by the testator that he had earlier made his last will and testament

some conflict among the authorities as to whether a codicil *proprio vigore*, independently of an expressed or implied intention, operates as a republication of a will. It has been settled, however, by a long line of decisions, that no particular words are necessary to constitute a republication. All that is necessary is that it shall appear that the testator considered the paper as his will at the time he made the codicil; anything that indicates a continuance of the testamentary intent with respect to the disposition of his property will be sufficient;⁸ as a codicil indorsed on a will, reciting the fact of the death of a devisee and giving the real estate to others.⁹

and several codicils thereto; that he could not find them and that he had not in any manner revoked them; that the following are copies of said last will and testament and codicils. He then incorporated the instruments thus identified at length. The document then closed with the following: "Now, therefore, I, the said Joseph H. Byrnes do hereby republish the said last will and testament and said codicils thereto, and do hereby declare the same to be my last will and testament and codicils thereto." This was signed and duly witnessed and held to be a valid will.—*In re Bearns' Will*, 89 Misc. Rep. 712, 153 N. Y. Supp. 1089.

⁸ *Corr v. Porter*, 33 Grat. (Va.) 278, 282.

Execution of codicil revives

prior will.—*Estate of Cutting*, 172 Cal. 191, 155 Pac. 1002.

Where the testator has not testamentary capacity at the time of making the original will, his subsequent execution of a codicil thereto while of sound mind, amounts to a republication of the original will.—*Smith v. Runkle*, (N. J. Prerog.) 97 Atl. 296, affirmed, (N. J.) 98 Atl. 1086; *Godley v. Smith*, (N. J.) 98 Atl. 1085; *Smith v. Scholfield*, (N. J.) 98 Atl. 1087.

The rule that the execution of the codicil revives the prior will, does not apply where the codicil is entirely inconsistent with the prior will.—*Freeman v. Hart*, (Colo.) 158 Pac. 305.

⁹ *Dunlap v. Dunlap*, 4 Desaus. Eq. (S. C.) 305.

§ 566. Codicil Need Not Be Attached to Will, But Must Refer to and Identify It.

An intent to revive a revoked will by the subsequent execution of a codicil may be inferred from any reference in the codicil which makes such intent obvious, though the codicil be not attached to the will; but if it be not attached the reference must identify the will to be revived without resort to other evidence, except to show that the instrument sought to be incorporated is the same as that referred to in the will.¹⁰

It is not necessary in order that a will may be republished by codicil that there should be mechanical connection between the two, nor that the latter should in so many words confirm the will. It is sufficient that it make some reference to the will which may be fairly construed into an acknowledgment thereof, or as indicating an intention that it should stand as the final disposition of the property of the deceased. It may be inferred from any reference which makes such intent obvious, as by reference to "my will," or to the will by date.¹¹ So that where a testator refers to the will in his codicil, and

¹⁰ *Allen v. Maddock*, 11 Moore P. C. 427; *In re Soher*, 78 Cal. 477, 21 Pac. 8; *In re Young's Estate*, 123 Cal. 337, 55 Pac. 1011; *Crosby v. Mason*, 32 Conn. 482; *Blackett v. Ziegler*, 153 Iowa 344, Ann. Cas. 1913E, 115, 37 L. R. A. (N. S.) 291, 133 N. W. 901; *Newton v. Seaman's Friend Soc.*, 130 Mass. 91; *Damon v. Bibber*, 135 Mass. 458; *Parrott v. Avery*, 159 Mass. 594, 38 Am. St. Rep. 465, 22 L. R. A. 153, 35 N. E. 94; *Booth v. Baptist Church of Christ*, 126 N. Y. 215, 28 N. E. 238; *In re Andrews' Will*,

162 N. Y. 1, 76 Am. St. Rep. 294, 48 L. R. A. 662, 56 N. E. 529.

See, ante, §§ 65-68, as to incorporation of other documents.

¹¹ *Crosbie v. MacDonal*, 4 Ves. Jun. 610; *Utterton v. Robins*, 1 Ad. & E. 423; *Brownell v. De Wolf*, 3 Mason (U. S.) 486, Fed. Cas. No. 2037; *Payne v. Payne*, 18 Cal. 291; *Pope v. Pope*, 95 Ga. 87, 22 S. E. 245; *Blackett v. Ziegler*, 153 Iowa 344, Ann. Cas. 1913E, 115, 37 L. R. A. (N. S.) 291, 133 N. W. 901; *Armstrong v. Armstrong*, 14 B. Mon. (Ky.) 333; *Miles v. Boy-*

sufficiently shows that he still regards it as his will, even though the codicil relates to personal estate only, it may operate as a republication as to realty, and pass after-acquired lands.¹² A married woman may revive a will revoked by marriage by a codicil thereto, without re-executing or republishing the will, provided she distinctly recognizes its existence and validity at the time of executing the codicil.¹³

§ 567. The Same Subject: Presence of Will and Formal Declaration Unnecessary.

It is not necessary in order to republish that the will be before the testator at the time of executing the codicil, nor that he make any formal declaration of an intention to do so.¹⁴ A codicil physically attached to the earlier of two wills does not necessarily show an intention to revive it. The intention must appear by the contents of the codicil.¹⁵ If a codicil inaccurately describe the will, it may yet have a republishing effect.¹⁶ Where it does not designate by date the will to which it is intended as an addition, it will be presumed to refer to the

den, 3 Pick. (Mass.) 213, 216; Haven v. Foster, 14 Pick. (Mass.) 534, 543; Harvy v. Chouteau, 14 Mo. 587, 55 Am. Dec. 120; Van Cortlandt v. Kip, 1 Hill (N. Y.) 590; Brown v. Clark, 77 N. Y. 369; Appeal of Wikoff, 15 Pa. St. 281, 53 Am. Dec. 597; Dunlap v. Dunlap, 4 Desaus. Eq. (S. C.) 305; Richardson v. Richardson, Dud. Eq. (S. C.) 184; Corr v. Porter, 33 Grat. (Va.) 278, 282.

¹² Hulme v. Heyagte, 1 Mer.

285; Corr v. Porter, 33 Grat. (Va.) 278, 283.

¹³ Brown v. Clark, 16 Hun (N. Y.) 559.

¹⁴ Goodtitle v. Meredith, 2 Maule & S. 5.

¹⁵ Marsh v. Marsh, 1 Sw. & Tr. 528, 30 L. J. Prob. 77. See, also, Walpole v. Cholmondeley, 7 Term Rep. 138; In re Chapman, 8 Jur. 902.

¹⁶ Rogers v. Pittis, 1 Addams Ecc. 30, 38; St. Helens v. Exeter, 3 Phillim. 461, n.

latest in date.¹⁷ But, of course, if it appear on the face of the codicil that it was not intended to republish, it will not have that effect.¹⁸

§ 568. Effect of Republication by Codicil: Intervening Codicils.

The legal effect of a codicil properly executed and referring to and identifying a previous will is to republish the will as modified by the codicil.¹⁹ It will be presumed that a codicil republishing a will, republishes it as modified by a prior codicil.²⁰ The republication of a will by codicil, without referring to intermediate codicils, does not revoke the latter.²¹ It is rather to be considered as confirming the will with every codicil which may belong to it.²² This, however, has been questioned except where a will was described generally and without mention of its date; but a description of a will by its date was thought to exclude subsequent codicils.²³

¹⁷ *Crosbie v. MacDonal*, 4 Ves. Jun. 615.

¹⁸ *Hughes v. Turner*, 3 Mylne & K. 666; *Smith v. Dearmer*, 3 Younge & J. 278; *Strathmore v. Bowes*, 7 Term Rep. 582; sub nom. *Bowes v. Bowes*, 2 Bos. & P. 500; *Neff's Appeal*, 48 Pa. St. 501; *Kendall's Exr. v. Kendall*, 5 Munf. (Va.) 272.

¹⁹ *Estate of Hayne*, 165 Cal. 568, Ann. Cas. 1915A, 926, 133 Pac. 277; *Manship v. Stewart*, 181 Ind. 299, 104 N. E. 505; *Blackett v. Ziegler*, 153 Iowa 344, Ann. Cas. 1913E, 115, 37 L. R. A. (N. S.) 291, 133 N. W. 901; *Smith v. Runkle*, (N. J. Prerog.) 97 Atl. 296, affirmed, (N. J.) 98 Atl. 1086; *Godley v. Smith*, (N. J.) 98 Atl. 1085; *Smith v. Scholfield*, (N. J.) 98 Atl. 1087.

²⁰ *Gordon v. Reay*, 5 Sim. 274; *Crosbie v. MacDonal*, 4 Ves. Jun. 615; *Farrer v. St. Catherine's College*, L. R. 16 Eq. 19; *Green v. Tribe*, 9 Ch. Div. 231; *Manship v. Stewart*, 181 Ind. 299, 104 N. E. 505.

²¹ *Green v. Tribe*, 9 Ch. Div. 231; *Crosbie v. MacDonal*, 4 Ves. Jun. 610; *Gordon v. Reay*, 5 Sim. 274; *Wade v. Nazer*, 12 Jur. 188; s. c., 1 Rob. Ecc. 627; *In re De la Saussaye*, L. R. 3 P. & D. 42.

²² *In re De la Saussaye*, L. R. 3 P. & D. 42. See, also, *Burton v. Newbery*, L. R. 1 Ch. Div. 234.

²³ *Burton v. Newbery*, L. R. 1 Ch. Div. 234. See, also, *Piggott v. Wilder*, 26 Beav. 90; *Fuller v. Hooper*, 2 Ves. Sen. 242; *Jauncey v. Attorney-General*, 3 Giff. 308.

§ 569. The Same Subject: Unexecuted Codicils.

An unexecuted codicil even when written on the same paper with a will was not considered to be ratified by a subsequent codicil referring to the will only.²⁴ In England, since the statute of 1 Victoria, ch. 26, an unattested codicil has uniformly been held not to be a part of the will for any purpose and therefore is not incorporated into a codicil of subsequent date which refers only to the will, even though the intervening codicil be on the same paper.²⁵ A codicil not duly attested is not included even under a reference to "codicils," if there are duly executed codicils to satisfy the meaning of the term.²⁶ Where reference is made to a codicil, or the re-executing codicil is styled "*another* codicil," the first paper purporting to be a codicil is thereby revived.²⁷

§ 570. Effect of Republication.

The effect of republication by a codicil at common law, under which realty acquired after the making of the will could not pass thereby, was to cause the will to speak from the date of the republication, and to bring this after-acquired realty within the operation of any general

While, generally speaking, it is true that the proper execution of a subsequent codicil gives life to and republishes the former will and former codicils attached, there is an exception to the rule, which is that if a prior will or codicil is utterly inconsistent with a subsequent will or codicil, the former is not revived and republished.—*Freeman v. Hart*, (Colo) 158 Pac. 305.

²⁴ *Haynes v. Hill*, 7 Notes of Cas. 256; s. c., 1 Rob. Ecc. 795; s. c., 13 Jur. 1058.

²⁵ *In re Willmott*, 1 Sw. & Tr. 36; *In re Peach*, 1 Sw. & Tr. 138; *In re Hutton*, 5 Notes of Cas. 598; *In re Phelps*, 6 Notes of Cas. 695.

²⁶ *Crocker v. Hertford*, 4 Moore P. C. C. 339.

²⁷ *Ingoldby v. Ingoldby*, 4 Notes of Cas. 493.

or residuary devise of the will.²⁸ But questions as to the effect of republication upon the real estate, to which a testator might have become entitled after the execution of his will, are of no practical importance since the statute of 1 Victoria, ch. 26, and various enactments of the United States,²⁹ under which the testator, by a will made at any time, is enabled to devise all real estate to which he may be entitled at the time of his death.³⁰ In other respects the effect of republication remains important, as with respect to purging it of undue influence,³¹ or as imparting vitality to a testamentary writing made by one under disability,³² or as where a will has been revoked by implication, and by the execution of a codicil referring thereto it is revived.³³

§ 571. The Same Subject.

A re-execution has no other effect than a republication, and does not alter or vary the effect of a will and its codicils any further than a republication.³⁴ "The effect of a republication according to all the cases is to bring down the will to the date of the codicil, so that both instruments are to be considered as speaking at the same date, and taking effect at the same time."³⁵ Conse-

²⁸ See, ante, §§ 26, 27, 28, 229.

²⁹ See, ante, §§ 229, 230.

³⁰ Ashley v. Waugh, 4 Jur. 572; Doe d. York v. Walker, 12 Mees. & W. 591.

³¹ Williams' Executors (6th Am. ed.) 225; O'Neill v. Farr, 1 Rich. L. (S. C.) 80.

³² Braham v. Burchell, 3 Ad-dams Ecc. 243.

³³ Brady v. Cubitt, 1 Doug. 31.

³⁴ Powys v. Mansfield, 3 Mylne

& C. 359; Drinkwater v. Falconer, 2 Ves. Sen. 623; Crosbie v. Macdonal, 4 Ves. Jun. 611; Booker v. Allen, 2 Russ. & M. 270; Langdon v. Astor's Exrs., 16 N. Y. 9.

³⁵ Corr v. Porter, 33 Grat. (Va.) 278, 283; Payne v. Payne, 18 Cal. 291; Mooers v. White, 6 Johns. Ch. (N. Y.) 360; Murray v. Oliver, 41 N. C. 55; Rose v. Drayton, 4 Rich. Eq. (S. C.) 260; Stover v. Kendall, 1 Cold. (41 Tenn.) 557.

quently the will is governed by the laws in force at the time of the execution of the codicil;³⁶ and where a testator free from any undue influence executes a codicil to a will which was made under such influence, it will free the will from taint of fraud.³⁷ And a will invalid because of lack of testamentary capacity of the testator at the time of its execution, is revived by a codicil which is free from that defect.^{37a}

§ 572. Defective Execution of Will Cured by Codicil.

A defectively executed will may be cured and rendered effective by a duly executed codicil referring thereto,³⁸ or written on the same sheet of paper.³⁹ Even an unattested will may be set up by a codicil duly executed.⁴⁰ Thus a codicil which confirms the will so far as it is consistent with it, is a republication of the will itself, "supplying all omissions, and remedying all defects, if any, in the execution of the latter."⁴¹ Where the two are written upon the same sheet of paper, a ref-

³⁶ *Corr v. Porter*, 33 Grat. (Va.) 278, 283.

A statute which changes the rules of evidence relating to the execution of wills has no retrospective operation, and a will must be proved as the law required at the date of its execution.—*Barker v. Hinton*, 62 W. Va. 639, 59 S. E. 614; *Giddings v. Turgeon*, 58 Vt. 106, 4 Atl. 711.

³⁷ *O'Neill v. Farr*, 1 Rich. L. (S. C.) 80.

^{37a} *Barnes v. Phillips*, 184 Ind. 415, 111 N. E. 419.

³⁸ *De Bathe v. Fingal*, 16 Ves.

Jun. 167; *Allen v. Maddock*, 11 Moore P. C. C. 427.

Where a will is invalid for want of proper execution, but is incorporated by reference in a codicil which is properly executed, the will and codicil will both be admitted to probate.—*In re Plumel's Estate*, 151 Cal. 77, 121 Am. St. Rep. 100, 90 Pac. 192.

³⁹ *Guest v. Willasey*, 12 Moore K. B. 2, 3 Bing. 614.

⁴⁰ *Harvy v. Chouteau*, 14 Mo. 587, 55 Am. Dec. 120; *Van Cortlandt v. Kip*, 1 Hill (N. Y.) 590.

⁴¹ *McCurdy v. Neall*, 42 N. J. Eq. 333, 336, 7 Atl. 566.

erence to the will is not requisite to identify it;⁴² and, on the other hand, where the reference identifies the unattested papers, whether a will or intermediate codicils, there need be no mechanical connection of the parts.⁴³ But the circumstance of a well-executed instrument being written on the same paper must still be regarded as materially helping to identify the imperfectly executed one, or even implying a reference where none is expressed.⁴⁴

If there be neither reference nor connection of parts, the duly executed codicil will not suffice to set up an unattested will or intermediate codicils.⁴⁵ Where a duly executed codicil bears no date, but refers to the will and is written upon the same paper, it may set up the will.⁴⁶

Unexecuted alterations can not be rendered valid by a codicil ratifying the will, unless especial mention of the alteration be made in the codicil,⁴⁷ or unless it be proved affirmatively by extrinsic evidence that the alteration was made before the codicil;⁴⁸ and even then if it appear to have been deliberative only, it will not be included in the probate.⁴⁹

⁴² *Guest v. Willasey*, 12 Moore K. B. 2; s. c., 3 Bing. 614.

⁴³ *Aaron v. Aaron*, 3 De Gex & S. 475; *Utterton v. Robins*, 1 Ad. & E. 423; *Allen v. Murdock*, 11 Moore P. C. C. 427; *Harvy v. Chouteau*, 14 Mo. 587, 55 Am. Dec. 120. See, also, *In re Smith*, 2 Curt. 796.

Contra: *Attorney-General v. Bains*, Prec. Ch. 270; s. c., 3 Ch. Rep. 10.

⁴⁴ *Guest v. Willasey*, 2 Bing. 429; *In re Terrible*, 1 Sw. & Tr. 140; *In re Smith*, 2 Curt. 796; *In re Claringbull*, 3 Notes of Cas.

1; *In re Cattrall*, 3 Sw. & Tr. 419, 33 L. J. Prob. 106.

⁴⁵ *Utterton v. Robins*, 1 Ad. & E. 423.

⁴⁶ *Williams v. Evans*, 1 Crompt. & M. 42; s. c., 3 Tyrw. 56. See, also, *Carleton v. Griffin*, 1 Burr. 549.

⁴⁷ *Lushington v. Onslow*, 6 Notes of Cas. 183.

⁴⁸ *In re Tegg*, 4 Notes of Cas. 531; *In re Wyatt*, 2 Sw. & Tr. 494, 31 L. J. Prob. 197.

⁴⁹ *In re Hall*, L. R. 2 P. & D. 256.

APPENDIX

OF

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AND THE LEADING WILLS ACTS OF
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